Federal Court of Appeal | Cour d'appel fédérale

**Date: 20260219**

**Docket: A-357-24**

**Citation: 2026 FCA 34**



**CORAM:** **WEBB J.A.**
**LOCKE J.A.**
**MACTAVISH J.A.**

**BETWEEN:**

**TSAWOUT FIRST NATION**

**Appellant**

**and**

**SHERI CLAXTON**
**VANESSA CLAXTON**

**Respondents**

Heard at Vancouver, British Columbia, on September 10, 2025.

Judgment delivered at Ottawa, Ontario, on February 19, 2026.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: WEBB J.A.
MACTAVISH J.A.

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**REASONS FOR JUDGMENT**

**LOCKE J.A.**

I. Overview

[1] Tsawout First Nation (Tsawout) appeals a decision of the Federal Court (2024 FC 1546 *per* Justice Cecily Y. Strickland, the FC Decision) that granted in part an application for judicial review by the respondents, Sheri Claxton (Sheri) and Vanessa Claxton (Vanessa), in respect of

two related decisions by Tsawout. The first is the decision to enter into an agreement dated May 31, 2022 (the Agreement) with Allan Claxton (Allan) and Earl Claxton (Earl) concerning Lot 47-6, CLSR 81466, on the East Saanich Reserve No. 2 (Lot 47-6). The second decision in issue is the refusal to refer the respondents' notice of dispute concerning the Agreement and the status of Lot 47-6 to the Dispute Resolution Panel (the Panel) as contemplated in the Tsawout First Nation Land Code (Land Code). The notice of dispute was submitted on November 18, 2022 and supplemented on December 13, 2022. The refusal to refer it to the Panel was communicated to the respondents in a letter dated January 12, 2023 from Christine Bird, the Band Manager of Tsawout (the January 12 Letter).



[2] The respondents argued before the Federal Court that the Agreement, which purports to provide Allan and Earl an unencumbered possessory interest in Lot 47-6 in exchange for the payment of $109,000 to Tsawout to satisfy a debt, should be declared void. The respondents also took issue with the refusal to refer their notice of dispute to the Panel. While the Federal Court declined to declare the Agreement void, it did order that the Panel address the concerns raised in the respondents' notice of dispute.

[3] Before this Court, Tsawout argues that the FC Decision should be set aside, and the respondents' application for judicial review dismissed.

[4] For the reasons set out below, I would dismiss the appeal.

## II. Background

[5] The factual background that has led to this appeal is rather complicated; it is set out in detail in the FC Decision. The outline below is sufficient for the purposes of this appeal.

[6] Sheri and Vanessa are mother and daughter. They are both members of Tsawout.

[7] Allan and Earl are brothers whose other brother Calvin Claxton (Calvin) is Vanessa's father and was married to Sheri. Allan and Earl are also members of Tsawout. In fact, Allan is a former Chief of Tsawout and was a sitting Band Councillor when Tsawout executed the Agreement with him and his brother. Calvin was a member of Tsawout at one time, but he transferred his membership to another First Nation around 2002.

[8] The three brothers each obtained an undivided one third (1/3) interest in Lot 47 (which includes Lot 47-6) in 1983. In 1994, they each transferred their interest in Lot 47-6 to Tsawout to secure a loan for Calvin to finance the construction of a home on Lot 47-6. A house was built and Calvin lived in it until he left Tsawout. Around that time, he also defaulted on the loan.

[9] Calvin and Sheri separated in 1995 and divorced some years later. Sheri claims that she has lived in the house on Lot 47-6 continuously since 2005 and that Vanessa has lived in the house continuously since 1995 except for a period in 2012-2014 when she was away at school. It appears that they made payments to Tsawout totalling about $23,000 between September 2006 and March 2012 in relation to their occupancy of the house. Whether that amount constituted

rent or payments toward the loan is unclear. There appears to be no evidence of payments after March 2012.

[10] In 2015, Calvin signed an "Absolute Disclaimer of Possessory Interest in Reserve Land (for use by a non-band member inheriting an interest in reserve land)" (the Absolute Disclaimer), which appears to have been used to register Allan and Earl as each holding an undivided half (1/2) interest in Lot 47-6.

[11] In 2018, despite the interest in Lot 47-6 being apparently registered to Allan and Earl, Tsawout sent Sheri a letter objecting to her continued occupation of the house on Lot 47-6. Tsawout indicated that the letter served as formal notice to vacate the property, failing which Tsawout might take eviction proceedings. Sheri and Vanessa did not vacate the property, but Tsawout did not pursue eviction.

[12] After the execution of the Agreement in May 2022, Allan and Earl delivered an eviction notice dated July 26, 2022 to Sheri and Vanessa. Sheri and Vanessa did not vacate. On September 1, 2022, Allan and Earl delivered another eviction notice to Sheri and Vanessa. Again, Sheri and Vanessa did not vacate.

[13] Later that month, Allan and Earl commenced proceedings in the Supreme Court of British Columbia to have Sheri and Vanessa declared as trespassers on Lot 47-6 and seeking an order for vacant possession of the property.

[14] Vanessa requested that Tsawout Chief and Council become involved, but the Band Manager took the position that the BC proceedings were a private dispute between individuals that did not directly interest Tsawout.

[15] It was at this stage that Sheri and Vanessa submitted their notice of dispute seeking the involvement of the Panel. They argued that the Agreement was inconsistent with the conflict of interest provisions of the Land Code due to Allan's status as a Tsawout Councillor and his involvement as an individual party to the Agreement. They also argued that they had a right to occupy the house as a matrimonial home.

[16] The Band Manager's response, the January 12 Letter, refused to refer the matter to the Panel to address the respondents' arguments, concluding that they lacked merit.

## III. The FC Decision

[17] As indicated above, while the Federal Court declined to declare the Agreement void, it did order that the Panel address the notice of dispute.

[18] Before discussing the merits of the application before it, the Federal Court addressed some preliminary issues. Specifically, the Federal Court addressed Tsawout's arguments that (i) the application improperly challenged two distinct decisions, being the Agreement and the January 12 Letter, (ii) the Federal Court lacked jurisdiction to address the application, and (iii) the application, which was commenced on May 23, 2023, was time-barred.

[19] The Federal Court concluded that the application was not improper because the Agreement, the subsequent communications and the January 12 Letter constituted a continuing course of conduct by or on behalf of Tsawout.

[20] The Federal Court also concluded that it had jurisdiction to address the application. In response to Tsawout's arguments on this issue, the Federal Court concluded that (i) the Agreement and the January 12 Letter had the potential to affect the respondents' rights, as contemplated in subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-4, (ii) both the Agreement and the January 12 Letter involved the exercise by Tsawout of powers conferred by Acts of Parliament, and hence it was acting as a "federal board, commission or other tribunal" as defined in subsection 2(1) of the *Federal Courts Act*, and (iii) the decisions in issue were of a public character. At paragraph 105 of its reasons, the Federal Court noted that the Land Code was developed under the authority of the *First Nations Land Management Act*, S.C. 1999, c. 24.

[21] With regard to the timing of the commencement of the application for judicial review, the Federal Court concluded that the issue was moot because the decisions in issue constituted a continuing course of conduct. The Federal Court also stated that, even if the respondents' application had been filed late, it would have exercised its discretion to extend the deadline.

[22] The two substantive issues addressed by the Federal Court were (i) whether Tsawout owed the respondents a duty of procedural fairness with respect to the Agreement or the refusal to refer the notice of dispute to the Panel through the January 22 Letter, and if so whether

Tsawout breached that duty, and (ii) whether Allan's involvement as a party to the Agreement as well as a Tsawout Councillor gave rise to a reasonable apprehension of bias.

[23] The Federal Court concluded that Tsawout did have a duty of procedural fairness to the respondents as individuals whose rights could be affected by its decisions. In respect of the Agreement, the Federal Court found that the respondents were denied procedural fairness because Tsawout, while understanding the respondents' position that they had a right to remain on Lot 47-6, denied them the opportunity to address the point before entering into the Agreement. As regards the January 12 Letter, the Federal Court found no authority for the Band Manager to refuse to refer the notice of dispute to the Panel. The respondents were therefore denied their right to present their case to, and to receive a reasoned decision from, the Panel. Though the Federal Court did not declare the Agreement void (because of the limited information it had concerning related proceedings before the Supreme Court of British Columbia), it indicated that it expected the Panel to address all of the respondents' concerns, including with regard to the Agreement.

[24] The Federal Court concluded that the respondents had not met their onus on the question of reasonable apprehension of bias.

## IV. Issues and Standard of Review

[25] Tsawout raises several issues in its appeal. I will address only those that are necessary to my conclusion that the appeal should be dismissed. Tsawout takes issue with the Federal Court's conclusions on

A. Whether the respondents' application was time-barred,

B. Whether the Federal Court had jurisdiction to decide the application, and

C. Whether Tsawout owed the respondents a duty of procedural fairness and, if so, whether that duty was met.

[26] The standard of review that normally applies on appeal of a decision on an application for judicial review is as indicated in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 45 (*Agraira*): the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. This Court steps into the shoes of the lower court such that the appellate court's focus is, in effect, on the administrative decision: *Agraira* at para. 46. This standard of review applies to the third issue identified above concerning procedural fairness owed by Tsawout.

[27] On that third issue, the Federal Court correctly recognized at paragraph 36 of its reasons that the standard of review applicable on questions of procedural fairness is similar to correctness – the Court, owing no deference to the decision-maker, must ask whether the procedure was fair

having regard to all of the circumstances. The parties agree on this. Where they disagree is whether the Federal Court's application of that standard of review was correct.

[28] The standard of review set out in *Agraira* does not apply to the first two identified issues. These involve conclusions reached by the Federal Court, but not on review of any decision-maker below. On the issues of whether the respondents' application was time-barred and whether the Federal Court had jurisdiction to decide the application, the standards of review are as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 10, 26-28 (*Housen*): the standard of correctness applies to questions of law, whereas questions of fact or of mixed fact and law from which no question of law is extricable are reviewed only where the Court finds a palpable and overriding error, that is an error that is obvious and goes to the very core of the outcome.

## V. Analysis

[29] Before discussing the issues identified above, it is necessary to address some preliminary points.

### A. *Preliminary Points*

#### (1) Supreme Court of British Columbia Decisions

[30] Tsawout argues that two decisions of the Supreme Court of British Columbia, *Claxton v. Claxton*, 2023 BCSC 665, and *Claxton v. Claxton*, 2023 BCSC 2417, are dispositive of the issue

of legal entitlement to Lot 47-6. Firstly, as the Federal Court stated, these decisions did not finally determine rights in the property. It is also important to bear in mind that the issues in dispute before this Court concern procedural fairness. It is not necessary for this Court to determine or consider the issue of the parties' legal rights in Lot 47-6, or whether the respondents are (or were) trespassers.



[31] For these reasons, I will not discuss the conclusions in the foregoing two decisions.

(2) New Documents on Appeal

[32] Another preliminary point concerns documents provided to this Court (either in the appeal book or otherwise) that were not before the Federal Court. These include (i) an email dated November 18, 2022 from Vanessa to Tsawout's Lands Manager (Casey Dick-Wyatt) that forwarded the initial notice of dispute, and a response thereto dated November 23, 2022 (appeal book, tabs 5 and 6), (ii) the pleadings in the proceedings before the Supreme Court of British Columbia (appeal book, tabs 13 to 15), and (iii) a writ of possession issued on July 18, 2024 by the Registrar of the Supreme Court of British Columbia recognizing legal possession of Lot 47-6 by Allan and Earl, and ordering Vanessa and Sheri to deliver possession of the property to them (attached as Appendix B to Tsawout's memorandum of fact and law).

[33] Generally speaking, this Court will not, on appeal, consider evidence that was not before the court below. There are exceptions to this general rule, but no formal motion was made to introduce new documents on the basis of any such exceptions. The parties' agreement to introduce new documents is not sufficient.

[34] Tsawout argues that, in any case, not much turns on these documents and they are intended simply to fill in missing information noted by the Federal Court. I agree that these documents are not particularly relevant to the issues in dispute, and I do not intend to rely on them in these reasons.



[35] I do note the following concerning the writ of possession. Unlike the other new documents, the respondents did not agree to its introduction before this Court, and therefore its admissibility is contested. It is a court-issued document such that this Court might take judicial notice of it. However, like the other new documents, it is of marginal relevance to the issues in dispute in this appeal, which concern procedural fairness.

[36] Tsawout also alleges that the house on Lot 47-6 was subsequently razed, but it appears that the Court has no evidence of this.

(3) Effect of the Agreement

[37] Tsawout's arguments on all of the issues on appeal are based on its position that, contrary to the conclusion of the Federal Court, the Agreement did not transfer any rights in Lot 47-6. Tsawout's view is that Allan and Earl's rights in Lot 47-6 had been registered in 2015, and the Agreement was simply a private agreement that settled the debt taken on in 1994 by Allan and Earl's brother, Calvin.

[38] Tsawout's position concerning the effect of the Agreement is weakened by its inability to provide a satisfactory explanation as to how Allan and Earl would have recovered the rights in

Lot 47-6 that they had transferred to Tsawout in 1994. Without such a satisfactory explanation, it appears that Tsawout retained those rights until the Agreement was executed, and that the Agreement was indeed the vehicle that transferred the rights back to Allan and Earl. The notice of eviction that Tsawout sent to Sheri in 2018 suggested that Tsawout understood at the time that it retained possessory rights in Lot 47-6.



[39] The Federal Court noted also that the Agreement explicitly and repeatedly refers to the "purchase" of rights in Lot 47-6.

[40] Tsawout points to the Absolute Disclaimer signed by Calvin and then registered in relation to Lot 47-6 in 2015, but it is unclear how such a document could convey rights held at the time by Tsawout to Allan and Earl.

[41] In view of the foregoing, it would be difficult to fault the Federal Court for seeing the Agreement as a vehicle for the transfer of rights in Lot 47-6 from Tsawout to Allan and Earl.

[42] Having addressed the foregoing preliminary points, I turn now to the issues in dispute.

B. *Whether the Respondents' Application was Time-Barred*

[43] Tsawout notes that an application for judicial review must normally be commenced in the 30 days following the impugned decision, but that the Federal Court concluded that (i) the normal deadline did not apply because the impugned decisions (the Agreement and the

January 12 Letter) amounted to a continuing course of conduct, and (ii) in any case, the respondents should be granted an extension of time.

[44] Tsawout disputes that the Agreement and the January 12 Letter amounted to a continuing course of conduct. It bases its argument on the assertions that (i) Allan and Earl have been registered as the holders of rights in Lot 47-6 since 2015, (ii) the Agreement did not actually transfer any rights in Lot 47-6, and (iii) the respondents have known since at least 2018, when they received Tsawout's notice to vacate the property, that they have no rights therein.

[45] As mentioned, however, the appellate standards set out in *Housen* apply and none of this establishes either an error of law or a palpable and overriding error on a factually suffused question by the Federal Court. Having considered the evidence before it, the Federal Court was entitled to conclude that the refusal to forward the notice of dispute for consideration by the Panel through the January 12 Letter was part of the same decision-making process as resulted in the Agreement – both were based on the conclusion that the respondents had no right to remain on Lot 47-6. I note that, in respect of both the Agreement and the January 12 Letter, the issue in dispute concerns the fairness of the procedure that led to this conclusion. The Federal Court properly noted that Tsawout, which is a party to the Agreement and on whose behalf the January 12 Letter was prepared, was well aware of the respondents' claim to rights in Lot 47-6.

[46] The Federal Court also noted that requiring separate judicial review proceedings for the Agreement and the January 12 Letter would be a waste of time and effort, considering the

similarities of the facts, legal issues raised and the basis of each decision. I find no fault in this view, which is essentially a matter of discretion that was open to the Federal Court.

[47] Moreover, Tsawout has provided no convincing argument that the Federal Court erred in agreeing to extend the deadline for commencing the application for judicial review, if necessary.

[48] For these reasons, I find no reviewable error in the Federal Court's analysis of the first issue in dispute.

C. *Whether the Federal Court had Jurisdiction to Decide the Application*

[49] Tsawout's argument on the issue of the Federal Court's jurisdiction to decide the application for judicial review is again based on its position that the Agreement did not result in any transfer of rights in Lot 47-6, and that it instead merely settled a debt. On this basis, Tsawout argues that the Agreement was a private agreement between Tsawout, on the one hand, and Allan and Earl, on the other, and hence it lacked the public character necessary to permit judicial review.

[50] As noted at paragraph 38 above, I do not accept Tsawout's position on the effect of the Agreement.

[51] In considering the question of its jurisdiction to decide the judicial review, the Federal Court considered three requirements: (i) that the impugned decisions affect the respondents' rights, impose obligations on them or cause them prejudice, (ii) that Tsawout, in entering into the

Agreement, was acting as a federal board, commission or other tribunal as defined in the *Federal Courts Act*, and (iii) that the impugned decisions were of a public character. Tsawout does not dispute that these requirements apply. Rather, it argues that they were not satisfied. Tsawout's arguments on all of these requirements depend on its position that the Agreement did not result in any transfer of rights in Lot 47-6.



[52] I am satisfied that the Federal Court did not err in concluding that the requirement that the respondents' rights were affected was met. As indicated above, it appears that the Agreement did transfer rights in Lot 47-6, and the respondents do claim rights in that property. The Federal Court was of the view that the two decisions of the Supreme Court of British Columbia did not finally determine those rights, and I am not convinced that the Federal Court erred in so finding.

[53] Moreover, the Federal Court was correct to question the authority of Tsawout's Band Manager to determine anything related to the notice of dispute. The Land Code provides a mechanism for consideration of disputes by the Panel, and the respondents' right to have their dispute considered by the Panel was clearly affected by the Band Manager's decision in the January 12 Letter. I decline Tsawout's invitation to infer a gatekeeper function for the Band Manager in respect of notices of dispute. Paragraph 39.1 of the Land Code clearly contemplates that the first step upon the filing of a notice of dispute is for the Lands Manager, not the Band Manager, to prepare and deliver a report thereon to the Chair of the Panel.

[54] Tsawout's argument on the second requirement for Federal Court jurisdiction, that it was not acting as a federal board, commission or other tribunal in entering into the Agreement, is

again based on the view, with which the Federal Court disagreed, that the Agreement did not transfer rights in Lot 47-6. I see no error by the Federal Court here.

[55] Tsawout cites the same view in support of its argument that neither the Agreement nor the January 12 Letter had the public character necessary to give it jurisdiction to decide the judicial review application. Again, I see no error in the Federal Court's conclusion on this requirement. As the Federal Court saw things, both impugned decisions affected the respondents, and Tsawout knew this in making the decisions.



D. *Whether Tsawout Owed the Respondents a Duty of Procedural Fairness and, if so, Whether that Duty was Met*

(1) Whether Tsawout Owed the Respondents a Duty of Procedural Fairness

[56] As with other issues discussed above, Tsawout's position that it owed no duty of procedural fairness to the respondents is based on its view that the Agreement had no effect on their rights. As mentioned above, the Federal Court disagreed and it did not err in doing so.

[57] With regard to the January 12 Letter, the Federal Court properly questioned the authority of the Band Manager to decide, or even to act as a gatekeeper for, a matter that was instead to be considered by the Lands Manager and the Panel.

[58] I agree with the Federal Court's conclusion that the respondents were owed procedural fairness in respect of both the Agreement and the January 12 Letter.

(2) If Tsawout Owed a Duty of Procedural Fairness, Whether that Duty was Met

[59] As indicated above, the Federal Court found that the respondents were denied procedural fairness because Tsawout entered into the Agreement without hearing from them despite being aware of their claim to rights in Lot 47-6, and then, by means of the January 12 Letter, blocked the respondents from having their notice of dispute duly considered by the Lands Manager and the Panel. The fact that the Federal Court referred to the 2007 version of the Land Code instead of the 2013 version is unimportant to these findings because there was no material difference between the two documents in this regard.

[60] Tsawout notes that the respondents knew since at least 2018 that their interest in Lot 47-6 was in dispute but took no action in that regard. However, I do not accept that the respondent's silence until matters came to a head is a sufficient indication that Tsawout met its duty of procedural fairness.

[61] Tsawout also cites the Band Manager's reasoned response to the respondents' notice of dispute in the January 12 Letter. However, the problem with that letter is not that it was not properly reasoned. It is rather that the Band Manager had no authority to make a decision in the matter. The Band Manager's analysis does not, and cannot, indicate how the Lands Manager or the Panel would have viewed the situation. Although the Land Code defines the Lands Manager as "the Tsawout First Nation employee responsible for the administration of Tsawout First Nation Land", a definition that could theoretically encompass the Band Manager, Tsawout had designated another employee, Mr. Dick-Wyatt, as "the" Lands Manager.

[62] Tsawout notes further that the respondents rejected its offer to assist them in finding other suitable accommodation. However, this offer could not meet Tsawout's duty of fairness in respect of the dispute resolution process mandated by the Land Code, a process that was not followed.

[63] Tsawout's other arguments on this issue concern the merits of the dispute regarding rights in Lot 47-6. As the Federal Court indicated, the questions before it concerned procedural fairness, and not the ultimate rights in Lot 47-6.

[64] I agree with the Federal Court that Tsawout failed to meet its duty of procedural fairness owed to the respondents.

## VI. Conclusion

[65] For the foregoing reasons, I would dismiss Tsawout's appeal.

[66] With regard to costs, I note that no costs were awarded in the FC Decision. The respondents indicated at the hearing that they seek costs in the amount of $10,000. They did not detail the basis for this amount, but they did express concern regarding Tsawout's failure to comply with the Federal Court's Judgment; paragraph 6 thereof required the Panel and/or Tsawout to complete and provide written reasons in respect of the respondents' notice of dispute within six months following the FC Decision. That deadline passed on April 2, 2025 apparently without action by Tsawout and without any motion to stay the Federal Court's Judgment.

[67] For its part, Tsawout argues that paragraph 6 of the Federal Court's Judgment is now moot in view of the writ of possession.

[68] It may be, as argued by Tsawout, that the apparent razing of the house on Lot 47-6 and the respondents' dispossession of the property by the Supreme Court of British Columbia makes the dispute resolution mechanism before the Panel of little practical use. However, this Court's role is simply to enquire as to whether the Federal Court made a reviewable error in its decision under appeal. As indicated, I see no such error.

[69] I would award costs of this appeal to the respondents in the all-inclusive amount of $3000.

"George R. Locke"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Anne L. Mactavish J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-357-24 |
| **STYLE OF CAUSE:** | TSAWOUT FIRST NATION v. SHERI CLAXTON, VANESSA CLAXTON |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | SEPTEMBER 10, 2025 |
| **REASONS FOR JUDGMENT BY:** | LOCKE J.A. |
| **CONCURRED IN BY:** | WEBB J.A.<br>MACTAVISH J.A. |
| **DATED:** | FEBRUARY 19, 2026 |

**APPEARANCES:**

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