Federal Court  Cour fédérale

Date: 20171006

Docket: T-503-16

Citation: 2017 FC 861

Ottawa, Ontario, October 6, 2017

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

SANDRA CROWCHILD

Applicant

and

TSUU T'INA NATION

Respondent

JUDGMENT AND REASONS

[1] Sandra Crowchild (the Applicant) asks me to overturn decisions of the Tsuut'ina Nation Chief and Council (Tsuut'ina) to allocate twenty-five acres of the Reserve land that she occupies to her half-sister, Regina Crowchild. She claims that the process was unfair in that she was not given notice of the key meetings at which the decisions were taken, nor given an opportunity to present her views. She also argues that the process followed gives rise to a reasonable apprehension of bias because Emmet Crowchild actively participated as a member of the Band

Council, despite his personal interest in the outcome. The Applicant wants these decisions reversed, and asks that the matter be referred back with directions.

[2] Tsuut'ina argues that the Applicant is out of time to bring this application, and that a judicial review can only challenge one decision rather than the two decisions in question here. Tsuut'ina also contends that the decisions were made in a fair manner, and that I should be reluctant to get involved in decisions about who can occupy which land on the Tsuut'ina Reserve.

[3] For the reasons that follow, I am granting the application for judicial review. The decisions are set aside and the matter is referred back to Tsuut'ina Chief and Council.

I. Background

[4] Tsuut'ina is a signatory to Treaty 7, and it occupies approximately 70,000 acres of land designated as Tsuu T'ina (Sarcee) Indian Reserve No. 145, which adjoins Calgary's city limits. As Reserve lands pursuant to the *Indian Act* (RSC 1985, c I-5), these lands are held in fee simple by the Crown for the use and benefit of the First Nation. Tsuut'ina does not issue Certificates of Possession under s. 20 of the *Indian Act* nor has it adopted written by-laws, policies or procedures regarding the allocation of Reserve lands. Instead it follows its own customs and traditions in the allocation and re-allocation of Reserve lands. These matters are dealt with on an "*ad hoc*" basis and the decisions on land matters are expressed through Directives issued by Chief and Council. Two such Directives are challenged in this proceeding.

[5] The origins of this dispute date back to the late 1940s or early 1950s, when Tsuut'ina allocated, in accordance with their custom and practice, several hundred acres of Reserve land to Harold Crowchild. In 1955, Harold Crowchild abandoned his wife Violet and their children. Violet continued to reside on the Crowchild lands until her death. The Applicant was born to Violet Crowchild in 1958 and she has lived with her mother on the Crowchild lands for virtually her entire life. The Applicant and her mother developed these lands into a functioning cattle ranch.

[6] Over time it came to be understood, in accordance with the customs and practices of Tsuut'ina, that the Crowchild lands were for Violet's use. By the late 1970s the Tsuut'ina Lands Department listed 212.5 acres of Reserve land as being allocated to Violet Crowchild. In 1967 a house (the "Old House") was constructed for Violet Crowchild, which she and the Applicant occupied until the mid-1980s when Tsuut'ina built her a new house. The Applicant lived with her mother in the new house until her mother's death in 2014. Since then, the Applicant has continued to occupy the property.

[7] In approximately 1994, Violet Crowchild consented to the allocation of 27 acres of the Crowchild lands to Emmet Crowchild, her grandson. Emmet Crowchild and his mother, Vera Marie Crowchild, have lived on this property in houses allocated by Tsuut'ina.

[8] There have been conflicts over use and occupancy of the Crowchild lands. One incident documented in the record relates to efforts by Emmet Crowchild to build a fence through lands outside of the parcel that had been allocated to him; it appears that he was seeking to assert

control over an additional portion of the Crowchild lands. When this was discovered, Violet Crowchild complained to the authorities on the Reserve. After the intervention of the Tsuut'ina Tribal Police and a stop work order issued by the Tsuut'ina Economic and Business Development Officer were unsuccessful, Chief and Council issued an order that the fence be removed.

[9] More recently, two key events set the stage for this proceeding: Emmet Crowchild was elected to Chief and Council, and Regina Crowchild, Emmet's aunt (and the Applicant's half-sister), returned to the Band list after many years. In or about 2014, Chief and Council approved a house for Regina Crowchild; however, this did not entitle her to commence construction, since she did not have any land allocated to her for this purpose. Under the custom and tradition of the First Nation, it was expected that Regina Crowchild would discuss land allocation with her family members in order to see whether a suitable arrangement could be made. Failing that, the custom and practice is that she take up the matter with the Tsuut'ina Lands Manager. This did not, however, result in a satisfactory solution.

[10] The matter was then discussed on several occasions by Tsuut'ina, which resulted in the issuance of the two Directives at issue in this proceeding. Following the issuance of the final Directive, there were a series of discussions between the parties about possible ways of addressing the ongoing concerns of the Applicant about the allocation of the disputed lands. When these did not result in a satisfactory agreement, the Applicant eventually retained counsel and commenced this proceeding.

II. Issues

[11] There are three issues:

(i) Is the application barred either by the 30-day time limit in s. 18.1(2) of the *Federal Courts Act* (RSC, 1985, c F-7), or because it is inconsistent with Rule 302 of the *Federal Courts Rules* (SOR/98-106) since it challenges two decisions of the Tsuut'ina Chief and Council?

(ii) Were the decisions made in accordance with the requirements of procedural fairness?

(iii) What is the appropriate remedy?

III. Analysis

A. *Issue 1: Is the application barred?*

[12] I will deal with the two preliminary matters together: is the application out of time under s. 18.1(2), or is it barred by Rule 302 since it challenges more than one decision of Chief and Council?

[13] The Applicant seeks to overturn two decisions taken by the Tsuut'ina Chief and Council, as reflected in Directive 218 issued July 3, 2015 and Directive 244 issued September 3, 2015. The application for judicial review was filed on March 24, 2016.

[14] Tsuut'ina argues that the application deals with two entirely different decisions, and that it should be dismissed because there is no reasonable explanation for the delay. Tsuut'ina

contends that the Applicant must demonstrate due diligence in meeting the time limit set out in s. 18.1(2). Waiting for full particulars of a decision is not sufficient to obtain an extension, and the time limit begins to run once the individual is informed of the substance of the decision even if they do not know all of the particulars or details: *Canada (AG) v Hennelly* (1999), 244 NR 399 (FCA) at para 3; *Forster v Canada (AG)* (1999), 247 NR 300, 1999 CanLII 8762 (FCA) at paras 3 and 6; *Goodwin v Canada (AG)*, 2005 FC 1185 at paras 33-35.

[15] In this case, Tsuut'ina says that it was taken by surprise since the Applicant never clearly indicated her objection to the decision contained in Directive 244; rather, she sought to obtain better compensation for herself and her son. In these circumstances, they believed that the Applicant had accepted the decision, and her delay from learning of the decision on September 3, 2015, until filing her application for judicial review on March 24, 2016, should not be excused.

[16] In addition, Tsuut'ina argues that Rule 302 forbids an applicant from challenging two decisions through one application for judicial review. Here, they submit the challenge is to two entirely separate decisions: in July, Chief and Council simply decided to allocate 25 acres of Reserve land to Regina Crowchild, as reflected in Directive 218. This decision is separate and distinct from the subsequent decision of Tsuut'ina to allocate a specific parcel of Crowchild lands to Regina Crowchild, as reflected in Directive 244. These two decisions should not be challenged in a single application for judicial review.

[17] For the following reasons, I do not accept the Respondent's arguments on these points.

[18] Subsection 18.1(2) of the *Federal Courts Act* requires that an application for judicial review be commenced within 30 days of the communication of the decision to the applicant. This deadline serves the public interest, in that it provides certainty and finality for both administrative decision-makers and those bound by their decisions: *Canada v Berhad*, 2005 FCA 267 at para 60.

[19] This time limit can be extended, however, and the overarching consideration is whether it is in the interests of justice to do so. This Court has ruled that the applicant must demonstrate: (i) a continuing intention to pursue the matter; (ii) that the application has some merit; (iii) that the respondent will not be prejudiced by the delay; and (iv) that there is a reasonable explanation for the delay: *Virdi v Canada (Minister of National Revenue)*, 2005 FC 529 at para 7; *James Richardson International Ltd v Canada*, 2004 FC 1577 at para 29; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 21. Many of the relevant precedents refer to a continuing intention to pursue an application for judicial review, but in my view it is sufficient that the Applicant demonstrated a continuing intention to pursue her legal remedies in regard to the decision: *Apv Canada Inc v Canada (Minister of National Revenue)*, 2001 FCT 737 at para 13.

[20] Rule 302 states: “Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.” This also serves the public interest, and provides for the orderly consideration of matters. An exception can be granted where multiple decisions amount to “one continuing course of conduct”: *Servier Canada Inc v*

Canada (Health), 2007 FC 196 at para 17; *Whitehead v Pelican Lake First Nation*, 2009 FC 1270 at paras 49-52 [*Whitehead*].

[21] In this case, the Applicant is challenging two decisions made within a matter of months by the same decision-maker, relating to the same subject matter, and she seeks identical relief in relation to both decisions: see *Whitehead* at para 51; *Shotclose v Stoney First Nation*, 2011 FC 750, at para 64 [*Shotclose*]. Although Tsuut'ina argues that the first decision was simply about whether to allocate any Reserve land to Regina Crowchild, and was therefore entirely separate from the second decision about the specific parcel, there is nothing in the record to suggest that there was any serious consideration of allocating other lands outside of the Crowchild lands. All of the relevant meetings and discussions flowed from the request of Regina Crowchild for an allocation of property for her house, and this request was focused on her desire to obtain a portion of the Crowchild property for this purpose.

[22] On the record before me, I find that the Applicant has continuously expressed her concerns to Tsuut'ina about the decisions, and she followed the custom and practice of the First Nation in seeking to resolve matters internally rather than going to court. The fact that Chief and Council engaged in these discussions reflects this custom, and confirms that they were not taken by surprise or prejudiced by the passage of time.

[23] I find that the application has merit, as will be more fully explained below. I further find that the Applicant has demonstrated a continuing intention to pursue the matter and has provided

a reasonable explanation for the delay. Finally, Tsuut'ina has not been taken by surprise or otherwise prejudiced due to the passage of time.

[24] On the facts before me, I find that these decisions form part of one "continuous course of conduct" and that it is appropriate to treat the two decisions together. I further find that it is in the interests of justice to extend the time period.

B. *Issue 2: Was there a breach of procedural fairness?*

[25] Both parties submit that the decisions of Chief and Council relating to the content of the customs and traditions of the Tsuut'ina Nation, and the decision to allocate Reserve lands in accordance with these customs and traditions, deserve deference and should be reviewed on a standard of reasonableness. I agree. As observed by Justice Richard Mosley in *Shotclose* at para 58:

> This Court has recognized that the Chief and Council have expertise on matters such as knowledge of the band's customs and factual determinations: *Martselos v. Salt River Nation #195*, 2008 FCA 221, 411 N.R. 1 at para. 30, citing *Vollant*, above, at paragraph 31; *Giroux v. Salt River First Nation*, 2006 FC 285 at paragraph 54, varied on other grounds in 2007 FCA 108. As such, and as noted by Justice William McKeown at paragraph 20 of *News v. Wahta Mohawks* (2000), 189 F.T.R. 218, 97 A.C.W.S. (3d) 585, "[…] a considerable degree of deference should be shown to a decision of a Band Council". This is only true, however, provided that the principles of procedural fairness and natural justice have been observed: *Ermineskin v. Ermineskin Band Council* (1995), 96 F.T.R. 181, 55 A.C.W.S. (3d) 888 at para. 11.

See also *Parker v Okanagan Indian Band Council*, 2010 FC 1218, at paras 38-41 [*Parker*].

[26] The parties further submit that the standard of review is correctness regarding whether there was a breach of procedural fairness, and I agree: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, *Shotclose* at paras 58-59. While the Federal Court of Appeal has indicated that the matter is not finally settled (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 13), I do not need to deal with this question since I find that there were breaches of procedural fairness whether the standard is one of correctness or reasonableness.

[27] It is now trite law that this Court has jurisdiction to deal with matters arising from the decisions of First Nations' Chief and Council where the issue concerns a matter of a "public" nature, regardless of whether the decision was taken pursuant to the *Indian Act*, a Band by-law or involves the application of a custom or practice of the First Nation: see *Vollant v Sioui*, 2006 FC 487 at para 25 [*Vollant*]; *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at paras 37-38 [*Hill*].

[28] As Justice Cecily Strickland observed in *Hill* at para 69:

> [T]he absence of procedural fairness requirements does not suggest that such requirements do not exist. Indeed, the jurisprudence has held that it is trite law that band councils must act according to the rule of law and that one of the cornerstones of procedural fairness is the right to be heard and to make representations before a decision affecting one's rights or interests is made (*Sucker Creek*, above, at para. 39; *Shotclose*, above, at para 97; *Minde v. Ermineskin Cree Nation*, 2006 FC 1311, at paras 44-46; *Laboucan v Little Red River Cree Nation # 447*, 2010 FC 722, at paras. 36-39; *Yellowknives Dene*, above).

[29] Justice Strickland went on to note, at para 71, that the Supreme Court in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817, held that the duty of procedural fairness is

flexible and variable and depends on an appreciation of the context of the particular statue and the rights affected:

> Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the procedural choices made by the agency itself. The list is not exhaustive.

[30] In applying these factors to the case before her, which also involved a decision about land allocation made by a First Nation in accordance with its customs and traditions, Justice Strickland found that the case "falls towards the lower end of the procedural fairness spectrum. However, even in cases where only minimal procedural fairness rights are required, those rights include notice, the opportunity to be heard and to have one's submissions considered, and notice of the decision..." (at para 77; citations omitted). See also *Parker* at para 61.

[31] The core of the claim here is that the process was unfair because Tsuut'ina failed to give the Applicant sufficient notice of the key meetings at which the land allocation issue was discussed. In addition, it is argued that the process was tainted by a reasonable apprehension of bias because Emmet Crowchild actively participated in the two meetings despite his personal interest in the outcome.

[32] Applying the relevant law to the facts before me is relatively straightforward. It is not necessary for me to make a finding as to the precise description of the legal or customary interest of the Applicant in the Crowchild property: there is no dispute that she had an interest, and was

recognized as the occupant of these lands following her mother's death. In this regard, the prior history is telling: at some point following 1957, Chief and Council recognized and acknowledged that the land initially allocated to Harold Crowchild was for the use and occupation of Violet Crowchild, and the records of the First Nation are consistent with this. It is not clear when or whether there was a formal decision taken to "allocate" these lands to Violet Crowchild; over time it appears that it was simply accepted that this was the reality.

[33] In this case, it is evident that Tsuut'ina acknowledged that the Applicant had an interest in the Crowchild property. This is demonstrated by their conduct: she was invited to meet with the Chief Executive Officer (CEO) following the July 14 meeting, and she was later invited to the September 3 meeting. The discussions at the May 6 and July 14 meetings also indicate a general awareness by Chief and Council of the history of the issues relating to the use and occupancy of these lands, and recognition that there was a need to sort out these issues following the death of Violet Crowchild.

[34] The Tsuut'ina custom and practice is that, while the ultimate decisions on who uses or occupies tracts of the Reserve remain with Chief and Council, in the normal course the intentions of the member holding an allocation will be taken into account in any decision about who the property is allocated to upon the death of the member. Here, the record is clear that Tsuut'ina were aware that Violet Crowchild had repeatedly indicated her intention that the Crowchild lands were to go to the Applicant and Shane Crowchild following her death. While the record shows that Violet Crowchild's intentions evolved over time, two facts are undisputed: she always indicated that she wanted the Applicant to have a share of the property, and at no time did she

indicate that Vera Marie or Regina Crowchild were to obtain any of the property. Chief and Council were aware of Violet Crowchild's wishes and had taken them under advisement.

[35] It is beyond question that the Applicant's interests would be affected by a decision to re-allocate the part of the Crowchild property on which stood the Old House, the barn, the water wells and other improvements. It is also beyond question that the Applicant was not given any notice of the first two meetings at which this matter was discussed.

[36] Tsuut'ina argued that the Applicant was given reasonable notice of the September 3 meeting, and points to the fact that she was invited to the meeting with the CEO following the issuance of Directive 214 in July. The Respondent's position is that this constituted reasonable notice and met the requirements of procedural fairness.

[37] It is true that the Applicant was invited to discuss this matter with the CEO following the July 14 meeting, but I find on the facts that she was not provided with "reasonable notice". This is largely a factual matter. The invitation to the meeting with the CEO was left on the Applicant's telephone answering machine on Thursday, July 16, 2015, but she did not actually receive this message until the early hours of July 20, the day on which the meeting was to occur. Upon receipt of the message, and prior to the time of the meeting, the Applicant telephoned the Band office and left a message indicating that she would not be able to attend, and explaining why.

[38] No effort was made to delay or re-schedule this meeting; no effort was made to arrange a separate meeting to provide the Applicant with an opportunity to "state her case" prior to the recommendation being made to Tsuut'ina. On the evidence before me, I find that this did not amount to "reasonable notice" of this meeting. I also find that this meeting was a key part of the chain of events that lead to the ultimate decision. The evidence of the sole affiant for Tsuut'ina is that once the recommendation from the CEO was made to Chief and Council, the decision was a foregone conclusion. In cross-examination, he agreed that the meeting of Chief and Council on September 3 was a "formality".

[39] In all of the circumstances, and on the evidence before me, I find that in making these decisions the Tsuut'ina Chief and Council acted in a way which breached procedural fairness by failing to provide reasonable notice of the meetings.

[40] Finally, I will address the allegation that the decision-making process was tainted by a reasonable apprehension of bias. Again, the sequence of events is instructive. Tsuut'ina decided that Regina Crowchild was entitled to a house upon her return to membership in the First Nation. Regina Crowchild then met with the Chief and the CEO to discuss an allocation of property on which her house would be built. This was followed by an initial discussion of this matter at a meeting of Chief and Council on May 6, 2015. I take particular note of the fact that the Minutes of this meeting show that Emmet Crowchild was "excused" from this discussion. Though the record is not clear whether it was Emmet Crowchild or Chief and Council who decided that he should not participate, the Minutes show that he did not take part in this discussion, presumably because it was recognized that this concerned the allocation of the Crowchild property.

[41] The fact that Emmet Crowchild was excused from the discussion, in and of itself, is an indication that he should not have participated in any subsequent discussions of this matter, but that is not what happened. Instead, the record shows that Emmet Crowchild actively participated in the discussion on July 14, 2015, at which his mother and his aunt made submissions about the allocation of the Crowchild properties. The Minutes of this meeting include the following:

> Vera Marie Crowchild – (Tsuut'ina Greeting)
>
> Is requesting for [*sic*] land allocation for new home and would like the land of the late Violet Crowchild to be split three ways between herself, Sandra Crowchild, Regina Noel Crowchild. Nobody owns the land.
>
> (Application Record, p. 74)

[42] The record indicates that this discussion mainly focused on the request of Regina Crowchild for an allocation of the Crowchild lands on which to build her house. Emmet Crowchild had previously been involved in a dispute about a part of this same property. I would note that Emmet Crowchild did not participate in the discussion of this matter on September 3, 2015.

[43] The law is clear that one of the fundamental tenets of procedural fairness is to have one's case heard by an impartial decision-maker; any decision which is tainted by a reasonable apprehension of bias is void: *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities*, [1992] 1 SCR 623 at 645 [*Newfoundland Telephone*].

[44] The test for reasonable apprehension of bias is well settled. The applicant must demonstrate that an informed person, viewing the matter realistically and practically, and having

thought the matter through, would think it more likely than not that the decision-maker would not decide fairly: *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394.

[45] It is also settled law that the application of this test is contextual, and that the decisions taken by elected officials will not be examined against the same standard as is applied in relation to judicial or quasi-judicial decision-makers, in recognition of the legitimate representational function of democratically elected decision-makers*: Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at 1195-97 [*Old St Boniface*]; *Newfoundland Telephone* at 638.

[46] How should the actions of a democratically-elected Chief and Council be assessed? This Court has addressed this question in a number of recent decisions. First, the core elements of procedural fairness must apply to those whose rights and interests are fundamentally affected by the decisions of Chief and Council, with whatever adjustments are warranted to reflect the unique circumstances of the First Nation: *Hill* at para 69; *Sparvier v Cowessess Indian Band No 73* (1993), [1994] 1 CNLR 182 at 198-99 (FCTD); *Vollant* at para 31; *Shotclose* at paras 90-92; *Lower Nicola Indian Band v Joe*, 2011 FC 1220 at paras 46-47 [*Lower Nicola Indian Band*].

[47] Second, we must recognize that Chief and Council make a wide range of decisions, similar to the range of decisions taken by other democratically elected bodies: *Old St Boniface*; *Newfoundland Telephone*. If this case involved a consideration by Chief and Council of a broad and general policy matter such as a new land tenure code, or a new process for the allocation of

Reserve property in general, it would be appropriate to apply the "closed mind" test set out in *Old St Boniface* and subsequent cases.

[48] Here, however, the decision was about a particular land allocation relating to a parcel of land on which the Applicant has resided for virtually her entire life, and in which she has a recognized (if not officially defined) interest. So this is a decision which affected a known and limited set of interests, admittedly within the wider context of the unique circumstance of land holdings on a First Nations Reserve, and against the backdrop where land is scarce and Chief and Council have many interests to consider in making these decisions: see *Nicola Band et al v Trans-Can Displays et al*, 2000 BCSC 1209 at para 155. The particular decision at issue here is closer to the "adjudicative" end of the policy spectrum, in contrast to many other decisions that Chief and Council must take: compare the circumstances in *Hill*, where the issue was land allocation according to custom and involving a single individual, to the facts in *Parker* where Council was considering a specific case in the context of the development of an overall land allocation policy.

[49] In addition, here the alleged apprehension of bias arises from a particular personal interest. The specific allegation is that, in light of the history of dealings and disputes regarding the Crowchild properties, Emmet Crowchild's personal interest required that he not participate in this process. On this point, the following passage of Sopinka J. in *Old St Boniface* at 1196, is instructive:

> I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other… There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make

> it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality.

I would adopt this reasoning with equal force to the situation of Chief and Council in this case.

[50] Having said that, I hasten to add that this Court has, on several occasions, recognized that issues of bias and procedural fairness must be examined in light of the particular context of small First Nations, where close family ties or employment with the First Nation may not be easily separated from decision-making processes. I agree with the observations of Justice Marshall Rothstein in *Sparvier* at para 75:

> If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

See also *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at paras 41-43; *Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835 at paras 33-34.

[51] In this regard, I would observe that, in the recitation of the factual history of the matter, the Applicant expressed concern that at one point Regina Crowchild had discussed the property issue with the Tsuut'ina Lands Manager, Jim Two-Guns, who is her half-brother. Counsel did not press this point during oral argument. Were it necessary, I would be prepared to find that this

sort of interaction would not give rise to a reasonable apprehension of bias in these circumstances. In engaging in this discussion, Mr. Two-Guns was simply doing his job, and he was only making a recommendation to Chief and Council – he was not the ultimate decision-maker. Like many rural and smaller communities in Canada, for many First Nations local decision-making would grind to a halt were it necessary to avoid any dealings between close family members or personal friends. However, given my finding below I do not need to determine this matter here.

[52] While I acknowledge that there may be occasions when necessity demands that a Chief or Councillor with a personal interest participate in a decision where that interest is directly affected, this is not such a case. Here, there was no necessity for Emmet Crowchild to participate in this decision-making process. There is no suggestion that Council would be rendered unable to make a decision by his absence, for example by losing quorum, or having to depart from long-standing custom regarding the participation of an Elder: see *Lower Nicola Indian Band* at para 47. Indeed, the fact that he was "excused" from the May 6 meeting is telling.

[53] I find that the participation of Emmet Crowchild at the July 14 meeting of Chief and Council gave rise to a reasonable apprehension of bias, which in and of itself would be sufficient to taint the decision-making process, in particular in light of the evidence that the September 3 meeting was a "formality".

C. *Issue 3: What is the appropriate remedy?*

[54] The Applicant asks that I set aside the two decisions of Chief and Council, and that I refer the matter back with directions. Tsuut'ina also asked that I provide directions to Chief and Council in the event that I granted the relief sought.

[55] Tsuut'ina cautioned, however, that I should be reluctant to overturn the decision here because doing so could unleash an avalanche of similar applications from disappointed members. In addition, counsel argued that it is not for me to decide who shall live where on the Tsuut'ina Reserve – that this is a decision solely for Chief and Council. For the reasons already stated, I do not accept this argument. First, the Applicant made very clear that she accepts that the ultimate decision as to the allocation of land on the Reserve rests with Chief and Council. All that she is seeking is a fair process and the opportunity to state her case. In addition, the Applicant is not asking this Court to decide who shall live where on the Reserve.

[56] In addition, while it may be regrettable that this matter has come before me rather than being resolved by some process internal to the First Nation and in a manner more suited to its customs and traditions, it would be equally regrettable that members of Tsuut'ina or any other First Nation were without any meaningful recourse to vindicate their rights or essential interests: *Hill* at para 69; *Laboucan v Little Red River # 447 First Nation*, 2010 FC 722 at paras 36-39.

[57] For the reasons above, I set aside the decisions of Chief and Council expressed through Directive 218, dated July 14, 2015, and Directive 244, dated September 3, 2015, and remit the

matter back to Tsuut'ina. I would note here that both counsel indicated that, as a result of Band Council elections in the intervening period, Emmet Crowchild is no longer a member of Chief and Council. It is therefore not necessary for me to make any order specific to his participation in future decision-making on this matter.

[58] The parties asked me to provide directions to Tsuut'ina Chief and Council. I am mindful of the caution, expressed by both sides, that I should show deference to the decisions of Chief and Council both about the nature of Tsuut'ina customs and traditions, and about the decisions taken by the duly elected Chief and Council pursuant to these customs and traditions.

[59] In addition to the deference which is due, there is an additional obstacle here. The next steps between the parties depends on several facts which are unknown: whether Regina Crowchild still wishes to pursue an allocation of land for her house, and whether any other arrangements for such an allocation have been made; whether a suitable arrangement can be reached between Regina Crowchild, the Applicant and any other family members whose interests are involved; and when, whether or how Chief and Council want to deal with this matter or its more general policy regarding how land allocation decisions are made.

[60] In light of this, and given the respect which is due to the traditions and customs of Tsuut'ina, I decline to issue any binding directions on the parties. What is clear from these reasons is that Tsuut'ina must find a means of ensuring that those whose personal interests are directly affected by these sorts of land allocation decisions have an opportunity for meaningful participation in the process. On the evidence before me, this appears to be the accepted custom

and tradition of Tsuut'ina. Further, Tsuut'ina must seek to avoid, if at all possible, the involvement of anyone whose interests are directly affected by the decision in the actual decision-making process. It is for Tsuut'ina to decide how to respect these minimum procedural rules within the exercise of their customs and traditions.

IV. Costs

[61] Neither party made submissions on costs. When I raised the question during the hearing, the Applicant asked for solicitor-client costs, in view of the hardship on his client of bringing this application and her financial and personal circumstances. Tsuut'ina opposed this request, and asked for the opportunity to make submissions on the point. I do not find that this is an appropriate case for the award of solicitor-client costs: see *Young v Young*, [1993] 4 SCR 3; *Asics Corporation v 9153-2267 Québec Inc*, 2017 FC 257.

[62] The Applicant was successful in this matter, and I see no reason to depart from the usual rule. I therefore order costs in favour of the Applicant. In the absence of detailed submissions on costs, other than the arguments outlined above, I have considered the issue in light of the complexity of this matter – which involved a relatively simple record, cross-examination of only one witness for each party, and a one day hearing. I hereby fix costs at $2,500, inclusive of disbursements and taxes, in favour of the Applicant.

JUDGMENT in T-503-16

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted, with costs payable by the Respondent to the Applicant in the amount of $2,500, inclusive of disbursements and taxes.

2. Directive 218 dated July 14, 2015, and Directive 244, dated September 3, 2015, are hereby set aside, and the matter of whether to grant an allocation of land from the "Crowchild lands" to Regina Crowchild is hereby remitted back to Chief and Council of Tsuut'ina for reconsideration.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-503-16
STYLE OF CAUSE:	SANDRA CROWCHILD v TSUU T'INA NATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	SEPTEMBER 7, 2017
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	OCTOBER 6, 2017

APPEARANCES:

Mr. Clarke Ries	FOR THE APPLICANT
Mr. Gilbert Eagle Bear	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Clarke Ries Professional Corporation Barrister and Solicitor Calgary, Alberta	FOR THE APPLICANT
Gilbert Eagle Bear Barrister and Solicitor Tsuu T'ina (Sarcee), Alberta	FOR THE RESPONDENT