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DOROTHY A. HUYCK ET AL & ROBERT B. LYMAN & MARGARET M. LYMAN ET AL
(on behalf of a number of residents in Musqueam and Salish Parks)

v.

THE MUSQUEAM INDIAN BAND,
ASSESSOR FOR THE MUSQUEAM INDIAN BAND &
DR. J. KESSELMAN

v.

THE MUSQUEAM INDIAN BAND BOARD OF REVIEW

Federal Court of Canada (T-49-99) Trial Division

Before the HONOURABLE MR. JUSTICE NADON

Ottawa, Ontario, May 5, 2000

Gordon Funt & Howard Mickelson for the Petitioners
John Savage for the Respondent Assessor
Wendy Baker for the Respondent Band
John R. Lakes for the Intervenor

Reasons for Order May 5, 2000

Background

This is an application for judicial review of a decision made by a panel of the Musqueam Indian Band Board of Review ("the MIBBR") on July 6, 1998 with respect to property tax assessments for the year 1997.

The MIBBR was created pursuant to section 40 of the Musqueam Indian Band Property Assessment By-Law PR-96-01 ("the Bylaw") which was enacted by the Musqueam Indian Band ("the Band") under paragraph 83(1)(a) of the *Indian Act*, R.S.C. c. I-5 as amended.[1] The framework is as follows: the Band appoints MIBBR members. Panel members are then selected by the MIBBR. The MIBBR hears appeals on assessments of land located on the Musqueam Reserve. One hundred and seventy-five applicants are involved in this case. The Respondents are the Band, and the Assessor for the Band.[2] The MIBBR has Intervenor status on the issue of jurisdiction.

The grounds for the application are that a reasonable apprehension of bias exists with respect to the MIBBR's independence; that a reasonable apprehension of bias exists with respect to the panel of the MIBBR that heard the Applicants' property tax assessment appeals; that the MIBBR acted without jurisdiction; and that the MIBBR did not observe the rules of natural justice and procedural fairness.

The Applicants seek an Order setting aside the July 6, 1998 decision and sending the matter back to be reheard by a panel whose members are approved by this Court, by the British

Columbia Supreme Court or by the Applicants' solicitors. The Applicants also seek costs against the Band on a solicitor-client basis.

Facts

The Applicants are non-native leaseholders of property located on the Reserve and have no right to vote. They appealed their 1997 property tax assessments to the MIBBR. Initially, the panel set to hear the case was comprised of Mr. David Cavazzi, Judge Alfred Scow,[3] and Mr. Peter Clark, but Mr. Clark subsequently became unavailable[4] to sit for the hearing which was set for January 14, 1998. On January 3, 1998, Mr. Cavazzi called counsel for the Band,[5] Mr. Lawrence Fast, to advise him of Mr. Clark's unavailability. Mr. Fast indicated that he would recommend that Mr. Alasdair Gordon be appointed to the MIBBR at the Band meeting on January 5, 1998.[6] In this same telephone conversation, Mr. Cavazzi informed Mr. Fast that Mr. Gordon's firm had been involved as experts on behalf of the Musqueam Park Leaseholders in another case, but that Mr. Gordon had not personally participated in that file. Mr. Cavazzi further advised Mr. Fast that he had been employed at the same firm as one of the Applicants' experts. Mr. Fast replied that he saw no problem arising from either Mr. Gordon's or Mr. Cavazzi's backgrounds. On Mr. Fast's recommendation, Mr. Gordon was appointed to the MIBBR on January 5, 1998.

On January 14, 1998 the panel of the MIBBR convened with Mr. Cavazzi as Chairman,[7] Judge Scow and Mr. Gordon. The Applicants did not object to the constituency of the panel. However, both the Assessor and the Band objected to Mr. Cavazzi and Mr. Gordon sitting on the panel on the grounds that there was a reasonable apprehension of bias. The panel stepped down and the hearing was adjourned until a newly-constituted panel could be formed.[8]

Approximately one month later (February 10, 1998), Mr. Cavazzi wrote the Band (Attention: Mr. Fast) and advised that, following the adjournment of the hearing, Judge Scow had been asked to investigate the allegations of bias and to provide an opinion on whether the allegations were valid. In Judge Scow's opinion, there was a reasonable apprehension of bias with respect to Mr. Gordon, but not with respect to Mr. Cavazzi. As a result, Mr. Cavazzi informed the Band that the MIBBR had a sufficient number of members[9] to hear the appeal and that the MIBBR was concerned about the delays. This letter was copied to Mr. John Savage, counsel for the Assessor; Mr. Howard Mickelson, counsel for Mrs. Huyck and some Musqueam Park residents; Mr. Gordon Funt, counsel for Mr. and Mrs. Lyman and some Salish Park residents; the Band Chief and Council, and MIBBR members.

On February 12, 1998, Mr. Fast wrote Mr. Funt, Mr. Savage and Mr. Mickelson and advised them that, given that two members had disqualified themselves during the January hearing, the Band would be making new appointments to the MIBBR. On February 17, 1998, Mr. Fast wrote to the MIBBR and informed them that two new MIBBR members (ie., Mr. Donald Brothers and Ms. Carol Roberts) had been appointed. On February 19, 1998, he wrote to the MIBBR once again and thanked Mr. Gordon and Mr. Cavazzi for having stepped down during the January hearing.[10] He also stated that the appointment of the two new members had resolved the scheduling issue.[11] On February 20, 1998, Mr. Fast sent a further letter to the MIBBR indicating that the MIBBR had "a panel of four members[12] who [were] qualified to hear the outstanding appeals." Neither of these letters were copied to the Applicants.

On February 19, 1998, Mr. Mickelson wrote the Band to inquire who was in charge with respect to arranging the hearing-i.e., the Band, or Mr. Cavazzi. In this regard, Mr. Mickelson was referring to Mr. Cavazzi's February 10th letter advising that the MIBBR had a sufficient number of members to hear the appeal, and to Mr. Fast's February 12th letter indicating that the Band would be making new appointments as a result of the two disqualification's.

On February 23, 1998, the MIBBR met and those members present at the Board meeting-namely, Judge Scow, Mr. Cavazzi, Mr. Gordon and Mr. Clark-resigned. The newly appointed members, Mr. Don Brothers and Ms. Carol Roberts, did not attend this meeting and did not resign.[13]

The following individuals were appointed to the MIBBR on March 23, 1998: Mr. David Sparks, Mr. Fred Cunningham, Mr. Laurent Rivard, Mr. Michael James O'Connor, Ms. Cheryl Lynn Adams, Mr. Rob Fraser, and Mr. Leon Getz.

On April 2, 1998, the MIBBR met and selected a new panel. Mr. Brothers, as Chairman of the MIBBR, suggested that he should be a member of the panel. The MIBBR members then agreed that the second panel member should be a lawyer and Ms. Roberts was thereby appointed to the panel. Regarding the third person who would sit on the panel, both Mr. Fraser and Mr. Rivard volunteered to serve on the panel, depending on the date of the hearing.

A new panel, comprised of Mr. Brothers, Ms. Roberts and Mr. Larry Rivard, convened on May 11, 1998. This hearing lasted six days (May 11-14, 1998, June 10-11, 1998). The decision of this panel, rendered on July 6, 1998, is the subject of this application for judicial review. The Applicants have also appealed the decision by way of Stated Case to the Supreme Court of British Columbia; this appeal was filed on August 21, 1998, and has been adjourned pending the disposition of this judicial review.

Prior to and following the hearing of May 1998, the Applicants repeatedly requested information from the Band regarding the reason for the resignation of Judge Scow, Mr. Cavazzi, Mr. Gordon and Mr. Clark. The Band never responded. The Applicants then requested the information from Mr. Cavazzi in September 1998, who provided them with the material on November 24, 1998. Included in the material was Judge Scow's opinion that there was a possibility of an apprehension of bias with respect to Mr. Gordon, but not with respect to Mr. Cavazzi. The material also contained correspondence from the Band's counsel to the MIBBR which was not copied to the Applicants,[14] as well as documentation of a conversation between the Band's counsel and the MIBBR which occurred before the January 1998 hearing regarding the appointment of Mr. Gordon. Further, the material showed that on February 23, 1998, the MIBBR met and decided that its independence seemed to be in question. As a result, Judge Scow, Mr. Gordon, Mr. Cavazzi and Mr. Clark resigned.

Before I set out the parties' submissions, a detailed chronology of events which transpired after the adjournment of the initial hearing will be helpful in understanding the parties' respective positions.

Chronology of Events

January 14, 1998: hearing is adjourned due to objections by the Assessor and the Band regarding a possibility of a reasonable apprehension of bias with respect to Mr. Gordon and Mr. Cavazzi.

January 26, 1998: Mr. Mickelson writes to Mr. Harvey indicating that pursuant to counsel's discussion that a "joint recommendation" be made to the Band for the appointment of another MIBBR member, he and Mr. Savage would like to recommend Ms. Roberts. He requests that Mr. Harvey recommend Ms. Roberts to the Band immediately so that she may be appointed to the MIBBR. Finally, he states: "Once she is appointed, we can then attend to setting an early hearing date."

January 30, 1998: Mr. Mickelson writes to the MIBBR and asks that the matter be dealt with as expeditiously as possible. He also mentions that he wrote counsel for the Band on January 26,

1998 and recommended Ms. Roberts for the MIBBR. Finally, he asks that a third MIBBR member be appointed as soon as possible so that the matter may proceed at the earliest possible date.

February 10, 1998: Mr. Cavazzi, on behalf of the MIBBR, writes to the Band (Attention to its General Counsel, Mr. Fast), and relates the following: that the MIBBR "finds itself in a somewhat awkward position. Members of the Board are appointed by the Musqueam Indian Band, who are one of the Appellants in this case"; that the MIBBR "felt it important to ensure that all other parties to the appeal were aware of the same information the Band possessed concerning Board members..."; that Judge Scow investigated the allegations of reasonable apprehension of bias, and indicated that a reasonable apprehension of bias existed with respect to Mr. Gordon, but not with respect to Mr. Cavazzi; and that the MIBBR "continues to have sufficient members to hear the appeal pursuant to the requirements of the Bylaw and is prepared to schedule hearings to have the matter concluded." This letter is copied to counsel for the Applicants, the Assessor, the Band Chief and Council and MIBBR members. (Also, this same letter is sent separately to Mr. Funt).

February 12, 1998: Mr. Fast writes to Mr. Funt, Mr. Savage and Mr. Mickelson and states: "As you are aware, two sitting members of the Musqueam Board of Review disqualified themselves from hearing certain residential appeals...." He also indicates that the Band will be making new appointments to the MIBBR soon. Further, he suggests that any inquiries should be made to the MIBBR.

February 17, 1998: Mr. Fast, on behalf of the Band, writes to the MIBBR (Attention Mr. Cavazzi) and informs them that two additional members (Mr. Brothers and Ms. Roberts) have been appointed to the MIBBR.[15] He gives a brief description of the members' backgrounds and experience. He also states that "it is anticipated that there will be several appointments made from the Musqueam Board of Review to the Boards of review for other First Nations and vise versa. Final details of these cross appointments are being negotiated." This letter is copied to the Board of Review (since the letter is addressed to the Board of Review, I am assuming he is copying the remaining members of the MIBBR.). This letter was not copied to the Applicants.

February 19, 1998: Mr. Fast, on behalf of the Band, writes to the MIBBR (Attention Mr. Cavazzi) and indicates that the Band has always been concerned with protecting the integrity of the MIBBR and it objected because it "was not prepared to risk even the slightest allegation of potential bias on the part of the Board of Review." Mr. Fast also thanks Mr. Gordon and Mr. Cavazzi for "stepping aside from sitting on the hearings in question." He indicates that "the scheduling issue has been resolved by the appointment of two additional members" to the MIBBR. This letter is copied to all the members of the MIBBR (Mr. Clark, Judge Scow, Mr. Gordon, Mr. Brothers, and Ms. Roberts). Again, this letter was not copied to the Applicants.

February 19, 1998: Mr. Mickelson writes to the Band (Attention Mr. Fast) and indicates that given Judge Scow's opinion that Mr. Cavazzi can still sit on the panel, there is no reason why the hearing cannot proceed with the originally-constituted panel (ie., Judge Scow, Mr. Clark and Mr. Cavazzi). He also states that he is "confused as to who is in charge in respect to arranging the hearing of this matter-yourself or Mr. Cavazzi." (He is referring to Mr. Cavazzi's indication on February 10th that the MIBBR has a sufficient number of members to proceed, while Mr. Fast's February 12th letter indicates that a new panel will be formed.) This letter is copied to Mr. Cavazzi, Mr. Savage, Mr. Funt, and Mr. Harvey.

February 20, 1998: Mr. Fast, on behalf of the Band, writes to Mr. Cavazzi, Judge Scow, Ms. Roberts, Mr. Brothers, Mr. Clark, and Mr. Gordon, stating that the MIBBR "has a panel of four members who are qualified to hear the outstanding appeals." He further states that "It is our [the Band's] understanding that the four members of the current panel will first meet to elect a chairman to handle the administrative issues relating to these appeals, and then proceed to schedule and hold the hearings." This letter is not copied to anyone else.

February 20, 1998: Mr. Savage writes to Mr. Funt to "express [his] concern over the exchange of correspondence between Mr. Mickelson, Mr. Cavazzi and now Mr. Fast." He states that there is no authority for a panel member who recused himself to reinstate himself (he is referring to Mr. Mickelson's suggestion that the originally-constituted panel can hear the case). He also implies that the Chairman should have raised this matter earlier and that "[i]f there is fault in this it certainly does not lie with the Band." This letter is copied to Mr. Mickelson, Mr. Fast, and Judge Scow.

February 23, 1998: Minutes of an MIBBR meeting at which 4 MIBBR members are present (Judge Scow, Mr. Clark, Mr. Gordon, and Mr. Cavazzi). The minutes show that the MIBBR was not consulted prior to the appointment of the two newest MIBBR members (Mr. Brothers and Ms. Roberts). The minutes also state that "Band's counsel indicated there were only four members of the newly expanded Board suitable to hear the outstanding assessment appeals and concern was expressed regarding the perception of interference in the administration of the Board." Further, the minutes state that the MIBBR unanimously believes that correspondence from Mr. Fast following the adjournment of the hearing has not helped in expediting the matter. Finally, the minutes state the following: "Upon considering the events which have occurred, all members indicated they no longer felt comfortable participating on the Board as it appears to lack the support of the Band and its independence appears to be in question. All present indicated they would be submitting their resignations independently to the Chief and Council of the Band."

February 27, 1998: Mr. Funt replies to Mr. Savage's February 20th letter. He takes issue with Mr. Savage's assertion that the Band is not at fault and points out that the Band was aware of Mr. Gordon's background but appointed him nevertheless. Therefore, the Band is responsible for the hearing not taking place. Mr. Funt also states that "a full and candid explanation by the Band is warranted at this time. Otherwise the inference will be that the hearing process is fundamentally flawed. A full explanation by the Band at this time would serve to assuage the apprehensions held by many of our clients and would serve to mitigate the damage to the Band's reputation that has resulted from the foregoing events." This letter is copied to Judge Scow, Mr. Harvey, Mr. Fast, and Mr. Mickelson.

February 25, March 3 and March 4, 1998: Letters of resignation sent to Chief Sparrow by Judge Scow, Mr. Gordon, Mr. Clark, and Mr. Cavazzi. With the exception of Mr. Cavazzi's letter of resignation, the other members do not provide any explicit reasons for which they are resigning. Mr. Cavazzi's letter, however, reviews the events of the last couple of months (as described above) and states the following: "On February 17, 1998 counsel for the Band notified us of two new appointments to the Board, without the benefit of any consultation. It was subsequently suggested to us which members of the Board should be considered to conduct the adjourned hearing. This is of concern since the Band is also an Appellant at the hearing. The events of the past few months have been disturbing. The appointment and rejection of a Board member within one week, the apparent rejection of findings concerning the apprehension of bias by Judge Scow, without the benefit of a hearing, and the suggestion of which Board members are acceptable to conduct a hearing raise concerns regarding the ability of the Board to function impartially."

March 6, 1998: Letter from Mr. Fast to Mr. Funt explaining why the two members recused themselves and expressing confidence in the MIBBR. This letter is copied to Judge Scow, Mr. Savage, and Mr. Mickelson.

March 12, 1998: Letter from Mr. Fund to Mr. Fast, repeating the request for an explanation on the Band's role (as also expressed in February 27th letter to Mr. Savage). Mr. Funt indicates that the "lack of any such explanation ... will serve only to compound the apprehensions held by many of our clients." This letter is copied to Judge Scow, Mr. Harvey, Mr. Mickelson and Mr. Savage.

March 13, 1998: Letter from Mr. Mickelson to the Band (Attention Mr. Fast) indicating that he had no warning from Mr. Fast or the Band that Mr. Gordon would be sitting on the January panel and

indeed, that he was a panel member. He also states: "Finally, I was wondering if and when you were going to be providing notice of the resignations of Mesrs. Clark, Gordon, Cavazzi and Judge Scow from the Musqueam Indian Band Board of Review? Also, I would like to know the date of those resignations." This letter is copied to Judge Scow, Mr. Harvey, Mr. Savage, and Mr. Funt.

March 26, 1998: Mr. Fast writes Mr. Brothers to inform him of several new appointments to the MIBBR. He also states the following: "Although a relatively large number of persons have been appointed for the Board of Review, it would probably be more efficient for a smaller core to hear the majority of the appeals. The choice of the panel to hear any particular appeal is, of course, up to the discretion of the Board of Review. With the number of persons available on the Board of Review, obtaining a panel for any particular appeal should be relatively straight forward."

April 2, 1998: MIBBR meets and elects panel to hear the case.

April 7, 1998: Mr. Brothers, on behalf of the MIBBR, writes to counsel for the Applicants informing them that the MIBBR held a meeting on April 2, wherein a panel was selected to hear the case. The panel would be comprised of himself acting as chair, Ms. Roberts as Vice-Chair and one of two other members, depending on their availability. The letter also mentions the resignations of the previous panel members, and the appointment of the new members.

April 16, 1998: Letter from Mr. Mickelson to Mr. Harvey. He states that he is directing the letter to Mr. Harvey as counsel for the Band and that he feels that under the circumstances, the issues raised by the letter will be more appropriately dealt with by Mr. Harvey than by Mr. Fast. He also indicates, among other things, that he has confidence in the new panel but it is nonetheless important that there be "an appearance of justice being done so that whatever decision comes down from the Board stands on its own merits and is not subject to any perception of conflict or bias." As a result, he suggests that a meeting be called between counsel for the Applicants, Mr. Harvey and the Chief of the Band in order to discuss three issues: one, the reasons for and dates of the resignations; two, the process by which the new MIBBR members were appointed; and three, the process by which the new panel was constituted.[16] This letter is copied to Mr. Funt.

May 11, 1998: Commencement of hearing.

July 6, 1998: Decision rendered by newly constituted panel of MIBBR.

August 21, 1998: Applicants' Stated Case is filed at the British Columbia Supreme Court.

September 11, 1998: Letter from Mr. Funt to Mr. Brothers advising him that he and Mr. Mickelson will be holding a Town Hall meeting with their clients to discuss the integrity of the assessment process. He indicates that the meeting will address three concerns: the appointment of the new members, the resignation of the previous panel, and Mr. Brothers' speeches at First Nations conferences concerning property assessments.

September 15, 1998: Letter from Mr. Brothers to Mr. Funt where he explains the appointment process. He mentions the timing of the appointments, includes extracts from his correspondence with Mr. Fast, and provides a copy of the minutes from the April 2, 1998 MIBBR meeting in order to assuage Mr. Funt's concerns. Mr. Brothers also states that he does not know why the previous panel resigned and that any questions on this topic should be directed to Mr. Cavazzi. Further, he responds to Mr. Funts's concern about his speeches and includes cases he has been involved in.

September 22, 1998: Letter from Mr. Funt to Mr. Cavazzi requesting all material pertinent to the resignations.

September 29, 1998: Letter from Mr. Cavazzi to Mr. Mickelson indicating that he has no objection to the release of all information related to the resignations. However, he also suggested that Mr. Mickelson first request this material directly from the Band.

October 2, 1998: Letter from Mr. Funt to Mr. Harvey, requesting material dealing with the resignations.

November 16, 1998: Letter from Mr. Mickelson to Mr. Harvey repeating Mr. Funt's request for the material, and pointing out that neither Mr. Funt nor he has received a response.

November 23, 1998: Letter from Mr. Mickelson to Mr. Cavazzi, explaining that they attempted to obtain the material from the Band but the Band never responded. Mr. Mickelson therefore asks Mr. Cavazzi to provide the documentation.

November 24, 1998: Mr. Cavazzi provides documentation to counsel for the Applicants.

December 8, 1998: Letter from Mr. Funt to Mr. Harvey referring to the new information he obtained with respect to the resignations and setting out his concerns. In particular, he states that the proceedings have been "infected" by the Board's actions, and asks that the Band pay the representation costs and that the matter be reheard by a panel whose members are approved either by the Federal Court, the B.C. Supreme Court, or by himself and Mr. Mickelson. He also indicates that if Mr. Harvey does not provide a response by the deadline imposed, he will commence proceedings in the Federal Court.

January 11, 1999: Applicants commence proceedings in the Federal Court.

Applicants' Submissions

The Applicants submit that the documentation they obtained from Mr. Cavazzi reveals a number of events which unfolded unbeknownst to them and that these events give rise to a reasonable apprehension of bias in the following ways:

1. Counsel for the Band, Mr. Fast, was aware of the backgrounds of the panel members before the hearing in January, and had approved of the panel.

2. Mr. Fast communicated directly with the MIBBR, without copying his letters to the Applicants. In this correspondence, Mr. Fast indicated that the Band appointed two new panel members to the MIBBR to resolve the scheduling issue. According to the Applicants, this overrides Judge Scow's opinion that there was no possibility of a reasonable apprehension of bias regarding Mr. Cavazzi.

3. The fact that two new members were appointed to the MIBBR prior to the resignation of the original members. According to the Applicants, insofar as the MIBBR had indicated that it had sufficient members to hear the case, the Band's decision to make these appointments essentially rejected Judge Scow's opinion concerning reasonable apprehension of bias.

4. The Band's "financial inducement in the form of potential cross-appointments" of MIBBR members to other aboriginal Boards; this refers to the February 17, 1998 letter by Mr. Fast to the MIBBR.

5. Mr. Cavazzi's statement in his resignation letter that the Band "suggested to us [the MIBBR] which members of the Board should be considered to conduct the adjourned hearing."

6. Mr. Cavazzi's statement in his letter of resignation that the past events are "disturbing" insofar as a MIBBR member was appointed and rejected within a week and the "apparent rejection" of Judge Scow's findings "without the benefit of a hearing."

7. The concern expressed at the February 23, 1998 MIBBR meeting "regarding the perception of interference in the administration of the Board" (Minutes).

8. The unanimous concern of the original panel MIBBR members that correspondence from Mr. Fast following the adjournment of the January hearing has not been "helpful in having the hearing resume and the appeal determined" (Minutes).

9. The indication by all former MIBBR members that "they no longer felt comfortable participating on the Board as it appears to lack the support of the Band and its independence appears to be in question" (Minutes).

10. The fact that Mr. Brothers did not disclose information about the following: the timing of his appointment, and Ms. Roberts' appointment; his role in advising the appointment of the third panel member (Mr. Rivard); the reasons for the previous panel's resignations; the Band's refusal to accept Judge Scow's opinion; and the Band's statement that the scheduling issue would be resolved with the appointment of two new members.

11. The Band's non-disclosure of information related to the following: the appointment of the two new members, the previous panel's resignation, the Band's refusal to accept Judge Scow's opinion, the promise of potential cross-appointments of MIBBR members to other Boards.

The Applicants submit that a reasonable apprehension of bias exists with respect to the panel of the MIBBR that heard the case, and with respect to that panel's independence, and point to the original panel's resignation as evidence of that bias. The Applicants submit that the Band should not have withheld the information concerning the resignations from the Applicants. Further, the Applicants submit that the new chairperson never entertained the concerns raised by the Applicants with respect to the integrity of the process, even though he was aware of the events that had transpired prior to his appointment. In effect, the Applicants submit that "the Band's direct interference with the administrative and decision making powers of the previous Board and the Band's subsequent concealment of the reasons for the former Board's resignation are fatal to the proceedings which continued before the new test case panel-irrespective of the *bona fide* intentions and conduct of the new test case panel."

The Band's Submissions

The Band submits that at the outset of the hearing before the new panel, the parties were asked whether they had any concerns regarding conflicts of interest and all the parties affirmed their confidence in the panel of the MIBBR and agreed to proceed with the hearing. Indeed, the Band affirms that counsel for the Applicants stated, as the transcript shows: "I expressly don't have any objection whatsoever and have no concern about this Board discharging its function independently and impartially." Counsel for the Applicants also accepted that "what happened in the past is in the past." Thus, in the Band's submissions, there is no issue with respect to the new panel's independence and impartiality; rather, the Applicants' allegations of bias revolve only around the original panel and the resignations which resulted.

With respect to the issue of independence, the Band submits that the MIBBR is independent of the Band.

On the issue of reasonable apprehension of bias, the Band submits that the only real complaint the Applicants have is that counsel for the Band refused to accept Judge Scow's opinion that Mr. Cavazzi's presence on the MIBBR could not lead to a reasonable apprehension of bias.

The Band submits that Mr. Fast did not act improperly. Mr. Fast declares in his affidavit sworn on March 16, 1999, that it was his intention to copy the February 19th and February 20th letters to all counsel of record, but due to administrative confusion in his office and a new secretary, the letters were inadvertently not copied. He also indicates that other than these two letters, he had no further contact with Mr. Cavazzi until his resignation on March 3, 1998.[17]

The Band also argues that the MIBBR was mistaken in obtaining Judge Scow's opinion and that one panel member could not judge another panel member's bias, or lack thereof. Moreover, Mr. Fast, notes in his affidavit at paragraph 29 that due to administrative confusion in his office, he only became aware of Mr. Cavazzi's February 10th letter informing the parties of Judge Scow's opinion following a conversation with Mr. Savage on February 19th. Mr. Fast attests that both he and Mr. Savage agreed that it was improper for Mr. Cavazzi to "reinstate" himself on the panel after he had recused himself. At paragraph 30 of his Affidavit, Mr. Fast affirms the following:

> Subsequent to my conversation with Mr. Savage on February 19, 1998, I wrote to the Board of Review and attempted to diplomatically indicate that once a member of the Board of Review had stepped down, the member could not reverse his previous decision. I felt that a softer, less direct approach was appropriate since I did not want to create a tense relationship between the Musqueam Indian Band and the Board of Review. I wrote this letter with the knowledge that Mr. Savage would make the same submission on behalf of the British Columbia Assessment Authority, though he would likely take a more direct approach.

Accordingly, he and Mr. Savage agreed that the proper course of action was for the MIBBR to establish a panel from the four remaining members of the MIBBR (Fast affidavit, parag. 28) – i.e., Judge Scow, Mr. Clark, Ms. Roberts and Mr. Brothers.

In addition, the Band submits that any faults of the MIBBR with respect to bias were resolved with the newly constituted panel. Consequently, the Band contests the Applicants' suggestion that the "taint" of previous resignations carried forward to the new panel for this would mean that the MIBBR is permanently tainted because of one incident from the past. Moreover, the Band submits that a newly constituted panel does not have an onus to make inquiries about past resignations. In short, the Band submits that the Applicants have not met the onus of demonstrating a sound basis for a reasonable apprehension of bias and suggests that the Applicants' position is based merely on suspicion.

Further, the Band submits that this Court should deny judicial review because an alternative remedy exists (the statutory right of appeal to the B.C. Supreme Court set out in the By-law) and the Applicants are already exploring this route (their appeal was to be heard in January 1999, but the hearing has been adjourned pending these proceedings). Finally, the Band submits that this Court does not have the jurisdiction to award costs, and in the alternative, that the Court should not award special costs to the Applicants.

The Assessor's Submissions

The Assessor for the Band ("Assessor") submits that the structure of the MIBBR would not cause a reasonable person to have a reasonable apprehension of bias. Further, the Assessor submits that the original panel acted properly by resigning when it believed that a possibility of bias could have existed. Moreover, the Assessor contests the allegation that the Band influenced the original panel MIBBR and submits that even if the Band tainted the original panel of the MIBBR, this

would not give rise to an apprehension of bias in the new panel. In the Assessor's view, the second panel was properly constituted, independent and impartial, and points to the sections of the transcript where the parties recognize this. In addition, with respect to the new chairperson's awareness of the previous resignations, the Assessor submits that his awareness is irrelevant to the question of bias. Also, the Assessor points out that the new chairperson asked the parties whether they wanted to raise any issues of conflict of interest and that Mr. Mickelson, counsel for some of the Applicants, expressly stated he had no qualms about the new panel's independence and impartiality. In short, the Assessor submits there is no evidence supporting the Applicants' allegations that there was a reasonable apprehension of bias. Finally, the Assessor asks that this application for judicial review be dismissed not only on the merits, but because the Applicants have an alternative remedy (the appeal to the B.C. Supreme Court), which they are concurrently seeking.

The Intervenor's Submissions

The Intervenor, MIBBR, submits that there is no evidence to support the Applicants' allegations and that the Applicants' case is based solely on suspicion. According to the Intervenor, there is no evidence of reasonable apprehension of bias with respect to the new panel, and furthermore, that there is no authority for the Applicants' proposition that the conduct of the previous panel spills over to a newly-constituted panel whose conduct is exemplary. In particular, the MIBBR submits that there is no evidence to show that the new chairperson refused to consider the Applicants' concerns about the integrity of the process and indeed, points to sections of the transcript where the parties were directly asked if they had such concerns and counsel for the Applicants stated that he had no doubt about the MIBBR's independence and impartiality. The MIBBR also points out that the Stated Case which was filed on August 21, 1998 makes no mention of bias.

Adequate Alternative Forum

It is clear that this Court can decline to undertake judicial review proceedings where an adequate alternative forum exists, or where the parties have not exhausted their remedies.[18] The alternative forum need not be a better forum, but simply an adequate alternative. For instance, in *Mackie, supra*, the appeal board of the National Parole Board was found to be an adequate alternative forum. According to the case-law, the following situations may not constitute adequate alternative forums: where the forum has no jurisdiction to deal with the issue;[19] where the forum is not sufficiently independent,[20] where a reasonable apprehension of bias exists in respect of that forum.[21]

In the case at bar, the Band and the Assessor have raised alternative forum as a preliminary issue and submit that this Court should not undertake judicial review since the Applicants have an adequate alternative forum-namely, the British Columbia Supreme Court. The Applicants filed a Stated Case to the B.C. Court on August 21, 1998, pursuant to subsection 80(2) of the Bylaw which allows a party who is affected by the MIBBR's decision to "require the Board [MIBBR] to submit a case for the opinion of a Court of competent jurisdiction on a question of law only..."

The Applicants submit that a determination of reasonable apprehension of bias is not purely a question of law, but a question of mixed fact and law and therefore, that they could not state a case on this particular issue.

Iacobucci J. in *Canada (Director of Investigation and Research)* v. *Southam*, [1997] 1 S.C.R. 748 at 766-767 distinguished a question of law from a question of mixed fact and law in the following way:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what 'negligence' means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact.

Applying this explanation to the case at bar, a determination of what the correct legal test for reasonable apprehension of bias is a question of law, whereas a determination of whether the facts in this case satisfy the legal test is a question of mixed law and fact. On this analysis, it is clear that the B.C. Supreme Court would not simply be asked to determine the correct legal test for reasonable apprehension of bias[22], but whether the factual circumstances give rise to a reasonable apprehension of bias. Since this is a question of mixed law and fact, the B.C. Court would not have authority pursuant to the terms of the by-law which limit its authority to questions of law, to make such a determination. Consequently, I am of the view that the B.C. Supreme Court is not an adequate alternative forum, and therefore, I will exercise my discretion to undertake judicial review.

Principles from the Case-law on Reasonable Apprehension of Bias

Reasonable Apprehension of Bias

In *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369 at 394, de Grandpr෨ J. formulated the test for reasonable apprehension of bias as follows:

> "... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically-and having thought the matter through-conclude."

The Supreme Court further observed that the grounds for the apprehension cannot be merely speculative, but must be substantial. The Court also held that the examination of whether a reasonable apprehension of bias exists in the context of an administrative tribunal must be more flexible.

Judicial Independence – *Tobiass*

It is clear that a reasonable apprehension of bias will exist where judicial independence is compromised. The test for judicial independence was explained by the Supreme Court in *Canada (Minister of Citizenship and Immigration)* v. *Tobiass*, (1997) 151 D.L.R. (4th) 119 at 141-142 (hereinafter "*Tobiass"*) as follows: "The test for determining whether the appearance of judicial independence has been maintained is an objective one. The question is whether a well-informed and reasonable observer would perceive that judicial independence has been compromised." For the Court, the "essence of judicial independence is freedom from outside interference" (142).

The factual situation in *Tobiass* bears some similarity to the case at hand and may help illuminate some of the issues before us. In *Tobiass*, an Assistant Deputy Minister of the Department of Justice met with the Chief Justice without the presence of counsel for the other party, and asked that the matter proceed as expeditiously as possible. This was in the party's interest. The Chief Justice then spoke to the Associate Chief Justice who was in charge of the case and secured a commitment to process the matter more expeditiously. In the Supreme Court's view, this was

inappropriate because "as a general rule of conduct, counsel for one party should not discuss a particular case with the judge except with the knowledge and preferably with the participation of counsel for the other parties to the case" (142). Another situation which gives rise to a reasonable apprehension of bias is, evidently, where the decision-maker is influenced by the litigant. For instance, in *Tobiass*, it was held that the litigant influenced the judge to expedite the matter, a result which flavoured that particular party.

Judicial Independence and "Selecting" Your Judges-*MacBain*

Furthermore, a reasonable apprehension of bias arises where a party selects his or her judges. This occurred in *MacBain* v. *Canadian Human Rights Commission*, (1985) 22 D.L.R. (4th) 119 (F.C.A.) where the Canadian Human Rights Commission investigated and prosecuted a case, and then appointed the tribunal members who heard the case. The Federal Court of Appeal held that "[s]uch a scheme violates the principle that no one will judge his own cause since it cannot be said that there is any meaningful distinction between being your own judge and selecting the judges in your own cause. Accordingly, the scheme is inherently offensive and gives rise to a reasonable apprehension of bias thereby violating the principles of natural justice" (126). As Heald, J. noted, the connection between the prosecutor of the complaint (i.e., the Commission) and the decision-maker (i.e., the Tribunal)

> "easily gives rise, in my view, to a suspicion of influence or dependency. After considering a case and deciding that the complaint has been substantiated, the 'prosecutor' picks the Tribunal which will hear the case. It is my opinion that even if the statute only required the Commission to decide whether there was sufficient evidence to warrant the appointment of a Tribunal, reasonable apprehension of bias would still exist" (128).

My interpretation of this case is twofold: first, litigants cannot "select" their judges; this is undisputed. Second, and I think this is less obvious, the Court's finding that a reasonable apprehension of bias exists seems to be grounded in the fact that, before appointing a Tribunal to hear the matter, the commission first determines whether the allegation of discrimination is substantiated. For the Court, when the Commission chooses the Tribunal members after having decided that the complaint is substantiated, this "represents after-the-fact justification for a decision already made by it and before judges of its own choosing" (132). Accordingly, the Court of Appeal held the provision which allowed the Commission to appoint a Tribunal inoperable.

Subsequent decisions by the Federal Court of Appeal have clarified that the *MacBain* decision does not stand for the proposition that one body (e.g., the Commission) cannot appoint another body (e.g., the Tribunal). For instance, in *Re the Jurisdiction of a Human Rights Tribunal to continue its inquiry and in re a complaint of Local 916 of the Energy and Chemical Workers' Union*, [1986] 1 F.C. 103 (F.C.A.), the Federal Court of Appeal held that the *MacBain* decision did not rule that it was ""inherently objectionable" for the Commission to appoint a Tribunal, nor that such Tribunals set up under the *Canadian Human Rights Act* necessarily lacked jurisdiction. Rather, Marceau J.'s interpretation of *MacBain* is that "when under the Act a complaint has been substantiated after investigation, the selection by the Commission itself of the Tribunal which will enquire into it can raise a reasonable apprehension of bias..." (110).

Inherently Flawed Structure and Apprehension of Bias – Matsqui Band

The issue of an institutional structure implicitly containing inherent flaws which lead to a reasonable apprehension of bias was considered by the Supreme Court in *Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3. The main issue in this case was whether the trial judge had properly exercised his discretion not to undertake judicial review on the grounds that an adequate alternative forum existed. The majority of the Court (Lamer C.J., Cory J., LaForest J.,

Major J., and McLachlin J.), for different reasons, held that the trial judge had not properly exercised his discretion and that an adequate alternative forum did not exist. The minority (Sopinka J., L'Heureux-Dube J., Gonthier J., and Iacobucci J.) found that the trial judge had properly exercised his discretion when he declined to undertake judicial review and that the band taxation tribunal did offer an adequate alternative forum.

With respect to the question of judicial independence, impartiality and reasonable apprehension of bias, only six members of the Court addressed the issue. Lamer C.J. and Cory J. found that the alternative forum (i.e., the band taxation tribunal) lacked institutional independence and was therefore not an adequate forum, while Sopinka J., L'Heureux-Dub9 J., Gonthier J. and Iacobucci J. held that the band tribunal was an adequate alternative forum and that allegations of bias were premature.

On the issue of reasonable apprehension of bias, Sopinka J. agreed with the trial judge's decision not to undertake judicial review and indicated that "institutional independence is often assessed by considering the practice of a tribunal as depicted in the context of an actual hearing" (p.72). Sopinka J. accepted the terms of the reasonable apprehension test, but "would defer application of the test so that the reasonable person will have the benefit of knowing how the tribunal operates in actual practice" (p. 68). Therefore, unlike Lamer C.J.'s reasons which focussed on the procedure established in the by-law to find that a reasonable apprehension of bias was implicit in the structure, Sopinka J. declined to undertake this examination given that the hearing had not occurred, nor had the tribunal members been selected.

For Chief Justice Lamer, it was not premature to consider the issue of reasonable apprehension of bias as it concerned the very make-up of the tribunal. As the Chief Justice noted: "The function of institutional independence is to ensure that a tribunal is legally structured such that its members are reasonably independent of those who appoint them" (p. 60, emphasis in original).[23] The Chief Justice found that a reasonable apprehension existed on three grounds: one, the lack of guaranteed remuneration; two, the lack of guaranteed tenure; and three, that the Band appointed the tribunal. In the Chief Justice's words:

> "The tribunals, whose members are appointed by the Band Chiefs and Councils, are being asked to adjudicate a dispute pitting the interests of the bands against outside interests (i.e., those of the respondents). Effectively, the tribunal members must determine the interests of the very people, the bands, to whom they owe their appointment" (58).

Before I elaborate on the Court's understanding of this third element, it is important to note that in the Chief Justice's view, these three factors combined gave rise to a reasonable apprehension of bias. Thus, he specifically emphasized that he was not deciding whether any one of those factors, in itself, would lead to the same conclusion (at page 58).[24]

Regarding the appointment of the Board, the Chief Justice stated the following: the fact that the Band selected the members contributed to the apprehension that the tribunal did not have a sufficient degree of independence. Moreover,

> "This fact contributes to the appearance of a dependency relationship between the tribunal and the band, particularly in the case at bar where the interests of the band are clearly at odds with the interests of the respondents. In fact, both the Matsqui and the Siska by-laws allow the bands themselves to be parties before their respective tribunals...The respondents are thus faced with presenting their case before a tribunal whose members were appointed by the very Band Chiefs and Councils who oppose their claim. This raises a problem similar to that addressed in *MacBain, supra*. In that case, the Federal Court of Appeal found a reasonable apprehension of bias where the prosecutor

> of the human rights infringement (i.e., the Human Rights Commission) also selected the members of the panel which would adjudicate the matter. This case, though not identical, raises the similar concern that a party should not be required to present its case before a tribunal whose members have been appointed by an opposing party (at page 57).

Finally, the Chief Justice considered what changes would satisfy the requirements of institutional independence in the context of aboriginal self-government:

> "Of course, Indian bands may be reluctant to cede the power to appoint tribunal members to the federal government, given that one of the purposes of the new tax assessment regime is to facilitate the development of Aboriginal self-government. Thus, to conform to the requirements of institutional independence, the appellant bands' by-laws will have to guarantee remuneration and stipulate periods of tenure for tribunal members" (p. 59).

This suggests that, notwithstanding the appointment process, guaranteed remuneration and tenure can redeem an aboriginal band from the charge of institutional bias.

Application of these principles to this case

In light of these general principles, the following three fundamental questions arise: First, would a reasonably well-informed person, viewing the matter realistically and practically, believe that there is a reasonable apprehension of bias with respect to the panel who heard the case? This question entails an examination of the events which transpired after the adjournment of the January 14, 1998 hearing, and whether those events spill over and taint the newly-constituted panel which actually heard the case and rendered the decision. Second, would a reasonable person believe that judicial independence has been compromised? In order to answer this question, the allegation of interference from the Band must be examined, and in particular, the means by which the panel was selected and appointed. Finally, the question of an institutional bias must be considered; that is, insofar as the Band appoints MIBBR members and attends MIBBR meetings, does this imply a structural flaw which implicitly gives rise to a reasonable apprehension of bias? Given the number of allegations set out by the Applicants to support their argument on reasonable apprehension of bias, it is practical to address each allegation individually.

The Applicants' first allegation is that there is a reasonable apprehension of bias because the Band knew and approved of the backgrounds of Mr. Cavazzi and Mr. Gordon. In effect, the Applicants take issue with the Band's subsequent objection to the backgrounds of these very panel members whom it had appointed to the MIBBR. The Band's explanation for its objection is that when it appointed Mr. Gordon on January 5, 1998, it had not seen the Bill of Costs from Mr. Gordon's firm, and therefore, was not aware of the degree to which that firm was involved with litigation pertaining to the parcels of land in question. With respect to Mr. Cavazzi, the Band explains that it did not initially object because it was not aware that the sole expert witness for the Applicants was a former associate of Mr. Cavazzi; until the hearing, the Band was under the impression that this witness would be one of many witnesses. I accept the Band's explanation for its objection to both Mr. Cavazzi and Mr. Gordon, and do not believe this raises a reasonable apprehension of bias. On the contrary, the motive for the Band's objection appears to have been to avoid any potential apprehension of bias. In any event, the real issue was whether the Band had good reason to object to Mr. Cavazzi and Mr. Gordon's presence on the panel. That issue was dealt with when the panel stepped down. Moreover, no argument was made before the panel on January 14, 1998 or before me that the Band, in appointing Mr. Gordon to the MIBBR and in not objecting a priori to his and Mr. Cavazzi's presence on the panel, waived its right to subsequently object.

The Applicants' second allegation is that Mr. Fast corresponded directly with the MIBBR on February 17, 1998 and on February 19, 1998, without copying these letters to counsel for the Applicants. The general principle from *Tobiass* is that one party should not meet with the decision-maker without the presence or participation of the other party. Mr. Fast swears in his affidavit that he intended to copy other counsel but inadvertently failed to do so due to administrative confusion in his office; he attributes this confusion to having recently moved to a new office and having hired a new secretary. I accept Mr. Fast's declaration in this regard. Having said that, the question still remains: notwithstanding Mr. Fast's intention to copy the Applicants, does his failure to do so give rise to a reasonable apprehension of bias?

The content of Mr. Fast's uncopied letters will clarify the basis for the Applicants' allegations of reasonable apprehension of bias. The crux of their allegations is the following: the Applicants take issue with the fact that they were unaware that two new members had been appointed. They also perceive the new appointments as "overriding" Judge Scow's opinion that no apprehension of bias existed with regard to Mr. Cavazzi. Further, they allege that a reasonable apprehension of bias exists since the New MIBBR members were appointed prior to the resignation of the original panel members.[25] Finally, the Applicants submit that the promise of potential cross-appointments constitutes a "financial inducement" from the Band which is unjustified influence on the MIBBR. In effect, the Applicants suggest that their lack of knowledge about the content of those letters implies a lack of integrity about the process.

As mentioned in the Chronology section, the letter of February 17, 1998 by Mr. Fast to the MIBBR contains two main pieces of information: first, that two new members (i.e., Ms. Roberts and Mr. Brothers) had been appointed to the MIBBR, and second, that cross-appointments from the MIBBR to other Boards were currently being negotiated. These two issues recur as the Applicants' third and fourth allegations and I will provide a more detailed analysis in those sections. For the moment, however, regarding the issue of Mr. Fast's not copying this February 17th letter, I find that there was no obligation on his part to copy this letter to the Applicants. It seems clear to me that Mr. Fast was dealing with internal matters and was therefore writing the MIBBR as the Band ("the Band *qua* Band" – i.e., the entity that appoints the MIBBR members), not as a litigant.

As to the February 19, 1998 letter, it reads as follows:

> Board of Review
> Musqueam Indian Band
> 6735 Salish Drive
> Vancouver, B.C.
> V6N 4C4
>
> Attention: D.C.Cavazzi. P. App. (AACI, RI(BC))
>
> Dear Sirs/Mesdames:
>
> Re: Musqueam Board of Review – 1997 Assessment Appeals
>
> Thank you for your letter of February 10, 1998. We hope the following will help clarify the position of the Musqueam Indian Band on this matter.
>
> The reputation of the Musqueam Board of Review is a matter of the highest concern for the Musqueam Indian Band. To protect the integrity of the Musqueam Board of Review and ensure that all persons concerned, both leaseholders and the nine hundred and eighty Musqueam Band members, the Musqueam Indian Band deliberately chose to

appoint only persons of integrity and proven professional competence to the Musqueam Board of Review.

The Musqueam Indian Band has always preferred to air on the side of caution when issues concerning the Board of Review have arisen. When necessary, the Musqueam Indian Band has acted to support the integrity of the Musqueam Board of Review in the public mind.

In this case, the issue of possible legal bias was raised at the hearing by members of the Board of Review. The circumstances in question were that the firm of one of the Board members of the Board of Review had been a full and active participant in a law suit involving the Musqueam Indian Band that still had many unresolved issues. In the second instance, the primary, indeed only, professional witness relied upon by one of the appellants had in the past had a financial and personal relationship with one of the members of the Board of Review.

In the circumstances, the Musqueam Indian Band was concerned, not withstanding its full and total belief in the integrity of both members of the Board of Review, that the average member of the Musqueam Indian Band or the public generally would perceive at least the potential for bias. Rather than risk the perception by anyone that the integrity of the Musqueam Board of Review might be compromised, the Musqueam Indian Band took the position that it was preferable to be cautious. The Musqueam Indian Band was not prepared to risk even the slightest allegation of potential bias on the part of the Board of Review.

In any event, the scheduling issue has been resolved by the appointment of two additional members to the Musqueam Board of Review. These two additional members are both solicitors and have had extensive experience in the field of appraisal law and the operation of assessment appellant tribunals.

On behalf of the Musqueam Indian Band we wish to thank the two members of the Board for raising the issue and then, when concerns were expressed, stepping aside from sitting on the hearings in question. Your actions not only confirmed your own personal professional integrity but also served to strengthen and protect the reputation of the Musqueam Board of Review.

We thank you for your consideration.

Yours truly,

MUSQUEAM INDIAN BAND

PER:

Lawrence R. Fast
General Counsel

LRF/af

c.c. Mr. Peter Clark
Judge Alfred Scow
Mr. Alasdair K. Gordon

Mr. Donald Borthers [*sic*]
Ms. Carol Roberts

In my view, unlike the February 17th letter which dealt with internal administrative matters, in this instance, Mr. Fast is writing on behalf of the Band, the litigant, but also, on behalf of the Band *qua* Band. With respect to this particular allegation, I am viewing Mr. Fast as counsel for the litigant. Consequently, I am of the view that this letter ought to have been copied to all the parties. Mr. Fast is responding to Mr. Cavazzi's February 10th letter (written to Mr. Fast as counsel for the Band, the litigant in these proceedings) and is suggesting that once the panel recused itself, it could not then reinstate itself. This suggestion is indirect, but it is evident that when Mr. Fast thanks the panel for stepping down, this is the implication. This is further amplified by the following statement in his affidavit:

> "Subsequent to my conversation with Mr. Savage on February 19, 1998, I wrote to the Board of Review and attempted to diplomatically indicate that once a member of the Board of Review had stepped down, the member could not reverse his previous decision. I felt that a softer, less direct approach was appropriate since I did not want to create a tense relationship between the Musqueam Indian Band and the Board of Review. I wrote this letter with the knowledge that Mr. Savage would make the same submission on behalf of the British Columbia Assessment Authority, though he would likely take a more direct approach" (parag. 30).

Indeed, Mr. Savage wrote the Applicants a letter on February 20, 1998 which he copied to the Band and to Judge Scow. In this letter, he directly stated what Mr. Fast had suggested in his own letter of February 19th – namely, that "there is no authority for a tribunal member, having recused himself, after submissions, to then reinstate himself." Thus, Mr. Savage's letter put the matter squarely in the public domain. The Applicants therefore had the opportunity of making representations on this issue. However, it is interesting to note that when Mr. Funt replied to this letter on February 27, 1998, he never addressed this issue, but focussed on the question of costs and of Mr. Gordon's appointment. Mr. Mickelson did not respond to Mr. Savage's letter.

Given these circumstances, I am of the view that a reasonably informed person viewing the matter practically and realistically would not conclude that Mr. Fast's failure to copy raises a reasonable apprehension of bias. Had Mr. Savage not brought the issue to the forefront with his letter, perhaps I might have come to a different conclusion. However, I need not decide that issue.

In their third allegation, the Applicants suggest that it was improper to appoint Mr. Brothers and Ms. Roberts prior to the resignation of the former panel members, particularly when the Applicants were not informed of this. The implication is that in so doing, the Band was trying to influence the constituency of the panel "behind the Applicants' backs." I do not accept the Applicants' submissions for the following reasons: first, Mr. Fast informed the Applicants on February 12, 1998 that the Band would be making new appointments soon and that any inquiries should be made to the MIBBR. Thus, the Applicants may not have been aware of the exact timing of those appointments, but they knew that the appointments were imminent. In addition, I note that there is no requirement for the Band to inform anyone of any appointments it makes, nor is there any obligation for the Band to receive input on those appointments. The selection and timing of appointments of MIBBR members are purely within the realm of the Band's discretion. Nevertheless, the Band did obtain input from the parties regarding possible appointments and every person recommended by the parties was eventually appointed.[26] For example, following the adjournment of the January 14th hearing, counsel agreed to suggest potential panel members in order to expedite the process. In this regard, on January 26, 1998, the Applicants and the Assessor jointly recommended Ms. Roberts for the MIBBR. This undoubtedly played a role in her appointment. Finally, although the Applicants were not informed of the seven additional appointments to the MIBBR, they were informed of the appointment and composition of the new

panel on April 7, 1998, five days following the meeting at which the election of this panel was made. For all these reasons, I find that the Applicants' lack of knowledge about the additional appointments and their timing does not give rise to a reasonable apprehension of bias.

Regarding the Applicants' argument that the Band ignored Judge Scow's opinion by appointing additional MIBBR members, when according to the MIBBR, there were enough members to hear the case (based on Judge Scow's opinion that Mr. Cavazzi was qualified to sit on the panel), the Band submits that the MIBBR was mistaken in soliciting this opinion. The Band argues that one panel member was not qualified to determine whether the presence of a co-panel member would give rise to a reasonable apprehension of bias. I accept the Band's submission on this point.

In my view, what ought to have happened is the following: the issue as to whether Mr. Cavazzi could sit as a panel member ought to have been debated in the public forum of a new hearing. If the MIBBR felt it had a sufficient number of members from which a panel could be composed, it ought to have convened, notwithstanding Mr. Fast's and Mr. Savage's view to the contrary. At the hearing, the Band and the Assessor would presumably have raised their objection to Mr. Cavazzi sitting on the panel, and the debate would have occurred in the presence of all the parties.

What happened instead is that Mr. Fast (and Mr. Savage) did not accept[27] Judge Scow's opinion and the Band proceeded to appoint two new members so as to ensure that there was a sufficient pool from which a panel could be composed. In my opinion, there is no doubt that the Band was free to appoint as many MIBBR members it deemed fit in the circumstances. The by-law makes it clear that a panel must consist of three members, but no provision in the by-law dictates the number of members on the MIBBR in general. Accordingly, nothing prevents the Band from appointing as many members to the MIBBR it deems fit. Thus, when the Band felt that the MIBBR did not have enough members from which a panel could be selected following the recusation of the two original panel members, it proceeded to appoint two additional members to the MIBBR. In my view, the appointment of the new members, in and of itself, does not raise any apprehension of bias.

The undercurrent of the Applicants' position, however, is that these additional appointments constitute interference by the Band. I will address this issue in more detail in my analysis of the Applicants' fifth allegation, but for the moment, I note that nothing or no one (including the Band) prevented the MIBBR from convening a panel as it saw fit. As I have already indicated, I agree with the Band's and the Assessor's position in that once Mr. Cavazzi and Mr. Gordon had stepped down, they could not then reinstate themselves on a new panel. If the panel members at the January hearing had any doubt about their ability to sit, they could have adjourned in order to consider whether the objections were well founded. However, that is not what took place. It is clear from subsequent correspondence between the parties (e.g., Mr. Mickelson January 26th and January 30th letters which recommended Ms. Roberts to the MIBBR) that everyone understood that a new panel would be constituted following the recusation of the January panel. Considering that the January 14th panel had terminated itself, Mr. Cavazzi's subsequent conduct (i.e., obtaining Judge Scow's opinion) is, to put it mildly, surprising. Having agreed, in effect, that the objections taken to his and Mr. Gordon's presence on the panel were well-founded, Mr. Cavazzi nevertheless proceeded to disregard the decision taken on January 14, 1998. Undoubtedly, under the circumstances, Mr. Fast must have been taken aback when he saw Mr. Cavazzi's letter announcing that he could now sit as a panel member. As I have already indicated, Mr. Fast's letter of February 19, 1998 ought to have been copied to the Applicants but I am of the view that the reasonably informed person would not consider this omission, in all of the circumstances, as an attempt to interfere with and/or influence the MIBBR.

The fourth allegation is that Mr. Fast's statement regarding cross-appointments leads to a reasonable apprehension of bias. In my view, this submission is pure speculation. When I read Mr. Fast's February 17th letter, it seems that he is merely passing along information to the MIBBR (he tells them of the new appointments, describes the backgrounds of the new members, and

informs that cross-appointments to other Boards are being negotiated). Examining the letter on its face, I am not satisfied that it points to a reasonable apprehension of bias. There is simply not enough evidence, based on the letter alone, to conclude that Mr. Fast is attempting to "bribe" the MIBBR with a promise of cross-appointments to other Boards.

The fifth allegation relates to Mr. Cavazzi's statement in his resignation letter that it was "suggested to us [the MIBBR] which members of the Board should conduct the adjourned hearing". Since there is no evidence (from the minutes of the April 2, 1998 MIBBR meeting at which the panel members were selected) that the Band literally suggested which MIBBR members should conduct the hearing, I am assuming this allegation refers to Mr. Fast's February 20, 1998 letter to the MIBBR (which was not copied to the other parties) in which he states that the MIBBR has a panel of four members (i.e., Judge Scow, Mr. Clark, Mr. Brothers and Ms. Roberts) who are qualified to hear the appeal. Does this raise a reasonable apprehension of bias? The implication is that Mr. Fast's statement constitutes outside interference from the Band, and indeed, the Applicants submit that the "Band's actions were tantamount to selecting its own judges for the appeals."

Certainly, on the basis of *MacBain* and *Matsqui*, we know that a reasonable apprehension of bias can arise where a party to the litigation "selects" or appoints the decision-maker who hears the case. This allegation brings together two key issues raised in *MacBain* and *Matsqui*: "selection" of the judges, and structural flaws implicitly leading to a reasonable apprehension of bias. In this case, the pivotal question is the following: does the Band's right to select the members of the MIBBR constitute an inherent flaw, pursuant to the principles set out in *McBain* and *Matsqui*? In this case, I am faced with the very question Chief Justice Lamer in *Matsqui* did not rule on-that is, does the sole fact of appointing the MIBBR members raise a reasonable apprehension of bias?

In my view, the analysis in this case for reasonable apprehension of bias cannot ignore or be disassociated from the very framework of the MIBBR. In particular, I note that the Band is in at least two important respects, inextricably linked with the MIBBR: for instance, the Band is entitled to be present at MIBBR meetings and the Band appoints members to the MIBBR. Thus, by the very structure of the MIBBR, the Band is inevitably privy to the MIBBR's operation and administration. For example, Mr. Fast was present at the April 2, 1998 MIBBR meeting at which the panel members were selected. It is easy to appreciate how this might pose a problem in a situation such as the one at hand where the Band is also a litigant before the MIBBR. This is not unlike the *Matsqui* case where, as the Chief Justice noted:

> "The tribunals, whose members are appointed by the Band Chiefs and Councils, are being asked to adjudicate a dispute pitting the interests of the Bands against outside interests (i.e., those of the respondents). Effectively, the tribunal members must determine the interests of the very people, the Bands, to whom they owe their appointment" (58).

For the Chief Justice, the fact that the Band selects the tribunal members suggests a degree of dependence which in turn, gives rise to a reasonable apprehension of bias. In effect, the Chief Justice affirms that "a party should not be required to present its case before a tribunal whose members have been appointed by an opposing party" (57).

In this case, it is clear that the Band appoints the MIBBR members (sometimes on the recommendation of the parties), but not the panel members who hear a given case. The minutes of the April 2, 1998 MIBBR meeting, for instance, show that Mr. Fast was present and commissioned the oaths, but had no say in the selection of the panel members. In fact, as I noted earlier, Mr. Brothers suggested that he ought to sit on the panel. All MIBBR members then agreed that the second panel member ought to be a lawyer and consequently, Ms. Roberts was appointed. Mr. Fraser and Mr. Rivard then volunteered to serve on the panel and a final determination would be made when the hearing date was fixed.

Therefore, the only insinuation against the Band derives from Mr. Fast's February 20, 1998 letter to the MIBBR which indicated that the Band decided that only four MIBBR members were qualified to hear the case following the recusation of the two original panel members. In my opinion, Mr. Fast's statement does not carry the sinister intention attributed to it by the Applicants – i.e., that the Band was "choosing" the judges who would hear the case. On this issue, Mr. Fast's sworn affidavit states: "Mr. Savage and I further agreed that the proper course of action was for the Board of Review to establish a panel to hear the appeal from the four members of the Board who had not stepped down and disqualified themselves" (parag. 28). Although this certainly reflects Mr. Fast's view that he did not believe, notwithstanding Judge Scow's opinion, that Mr. Cavazzi should reinstate himself on the panel after he had recused himself, this does not, in my opinion, imply that Mr. Fast was trying to pick which judges would hear the case. Moreover, a fax by Mr. Fast to Mr. Brothers and Ms. Roberts, dated March 26, 1998, confirms this. In this fax, Mr. Fast recommends that hearings be scheduled as expeditiously as possible and writes the following with respect to the panel: "Although a relatively large number of persons have been appointed to the Board of Review, it would probably be more efficient for a smaller core to hear the majority of the appeals. *The choice of the panel to hear any particular appeal is, of course, up to the discretion of the Board of Review"* (emphasis added).

As a result of this fax, Mr. Brothers arranged a meeting of the MIBBR, which was held on April 2, 1998. According to Mr. Brothers' affidavit sworn March 12, 1999, parag. 4, "at no time during this meeting was the question of the resignation of the former members of the Board discussed. We were concentrating on the election of a Chair, a Vice-Chair, the setting up of a panel to hear a Test Case to deal with the valuation of land and improvements on the Musqueam Indian Band Reserve, and setting down a date for the hearing of the Test Case." It was at this meeting that Mr. Brothers and Ms. Roberts were appointed to the panel. I have already mentioned that Ms. Roberts was appointed to the MIBBR on the recommendation of the Applicants and the Assessor. In this regard, the Applicants contributed to the MIBBR's operation. Although they did not actually select the panel members, neither did the Band. The most that can be said about the Band being privy to information unknown to the Applicants is that the Band knew the composition of the panel, as of April 2, 1998 whereas the Applicants were advised of this by letter dated April 7, 1998. In my view, this five-day delay in knowledge is not material. I am therefore of the view that the Band did not suggest which panel members ought to hear the case. In the circumstances, the fact that the Band appoints members to the MIBBR in and of itself, would not, in my view, lead the reasonable observer to conclude that this raises a reasonable apprehension of bias.

The Applicants' sixth allegation concerns Mr. Cavazzi's characterization, in his letter of resignation, of past events as "disturbing." As examples of such events, he cites the appointment and rejection of Mr. Gordon within one week as well as the Band's complete disregard of Judge Scow's opinion.[28] I have already dealt with these two issues in my analysis of the first and second allegations, respectively.

The Applicants' seventh, eighth, and ninth allegations all relate to the minutes of the February 23, 1998 MIBBR meeting at which the original panel members resigned. All of these allegations relate to the MIBBR's perception of events: the seventh allegation deals with the MIBBR's concern of interference from the Band; the eighth allegation deals with the MIBBR's concerns that Mr. Fast's correspondence was not helpful in expediting the process; and the ninth allegation deals with the MIBBR's belief that its independence was in question. In this regard, it is important to remember that the analysis of reasonable apprehension of bias is done from the perspective of a reasonably informed person viewing the matter practically and realistically. Accordingly, the issue is whether such a person would conclude that the MIBBR's beliefs give rise to a reasonable apprehension of bias. The Applicants submit that "[a] reasonable observer informed of the Board of Review's concerns and the resulting resignations would have a reasonable and well-founded apprehension of bias going to the very core of the Board of Review's independence." Before deciding this point, I note the following: the fact that the MIBBR perceives its independence to be in question does not necessarily mean that its independence is actually compromised or in

jeopardy. The resignations, in and of themselves, do not give rise to a reasonable apprehension of bias. In my view, the grounds for the resignations must be examined in order to make that determination. According to the letters of resignation, Mr. Clark resigned because his new position would limit his availability. Judge Scow resigned because recent changes in the MIBBR's role in tax assessment caused him to re-evaluate his continued membership. Mr. Gordon resigned following his consideration of events-in particular, the fact that the Band first appointed him to the MIBBR and then objected to his presence on the panel. Mr. Cavazzi's letter of resignation, on the other hand, outlines the recent events and describes them as "disturbing." He writes, in part:

> On February 17, 1998 counsel for the Band notified us of two new appointments to the Board, without the benefit of any consultation. It was subsequently suggested to us which members of the Board should be considered to conduct the adjourned hearing. This is of concern since the Band is also an appellant at the hearing.
>
> The events of the past few months have been disturbing. The appointment and rejection of a Board member within one week, the apparent rejection of findings concerning the apprehension of bias by Judge Scow, without the benefit of a hearing, and the suggestion of which Board members are acceptable to conduct a hearing raise concerns regarding the ability of the Board to function impartially.

In my analysis, I have examined each of the grounds mentioned in Mr. Cavazzi's letter of resignation and have found that none of those grounds gives rise to a reasonable apprehension of bias. The issue of non-disclosure of those grounds to the Applicants will be dealt with in the context of non-disclosure.

The Applicants' tenth allegation relates to the fact that Mr. Brothers did not disclose certain information to the Applicants-in particular, the timing of his appointment, as well as the timing of Ms. Roberts' appointment, the reasons for the previous panel's resignation, and Mr. Fast's promise of cross appointments. The Applicants essentially argue that an "informed observer would reasonably apprehend from Mr. Brothers['] failure to disclose or order disclosure of information relating to the resignations and the foregoing matters that Mr. Brothers would not act in an entirely impartial manner in deciding the Applicants' appeals." In my view, this argument is without merit and I accept the Band's argument that there was no onus on the new panel to inquire into the past resignations. Indeed, the following illustrates that the new panel did not make such inquiries. Mr. Brothers swears at paragraph 3 of his affidavit dated February 24, 1999 and at paragraph 1 of his affidavit sworn March 12, 1999, that when he was informed of the resignations, he was not given any reasons for the resignations. At paragraph 13 of his February 24, 1999 affidavit, he indicates that the resignations of the former MIBBR members did not concern him. His only concern was to deal with the matter promptly and to arrive at a reasonable decision. Further, in my opinion, Mr. Brothers' letter dated April 7, 1998 shows a good faith effort to clarify issues about the appointment of the new members and about the administration of the MIBBR in general. I therefore find that Mr. Brothers did not fail to disclose key information he was bound to disclose to the Applicants. If anything, he was forthright about the process. I am therefore of the view that the Applicants have not shown a reasonable apprehension of bias with respect to this particular allegation.

The Applicants' eleventh and final allegation relates to the Band's non-disclosure of certain information - in particular, the Band's approval and appointment of Mr. Gordon, the timing of the appointments of the new MIBBR members, the reasons for the resignations, the Band's rejection of Judge Scow's opinion, the Band's promise of cross-appointments to other Boards, and the Band's suggestion that four members could hear the appeal.

As I indicated earlier, I do not believe that the Band had a duty to inform the Applicants of Mr. Gordon's appointment, or of subsequent appointments to the MIBBR. I have also found that the

matter of potential cross-appointments was an internal matter which need not have been disclosed to the Applicants. Consequently, there was no duty on the part of the Band to disclose such information.

However, in my opinion, the Band *qua* Band did have an obligation to disclose the following two pieces of information to the Applicants: first, the letter of February 19, 1998 by Mr. Fast and second, the reasons for the resignations. I am of this view because Mr. Fast's February 19th letter seems to have been the "trigger" for the MIBBR's resignations. Rightly or wrongly, four members of the MIBBR perceived that letter as interference from the Band. As the Minutes of the February 23, 1998 meeting state: "It was also noted that the Band's counsel indicated there were only four members of the newly expanded Board suitable to hear the outstanding assessment appeals and concern was expressed regarding the perception of interference in the administration of the Board." In addition, Mr. Cavazzi clearly attributed his resignation to this perception of interference by the Band. Given that this February 19th letter seems to have been the catalyst for the resignations, I believe that the letter, in all of the circumstances, ought to have been disclosed to the Applicants when they requested information regarding the resignations.

After all, it should be remembered that Mr. Fast fully intended, as he states in his affidavit, to copy the letter to the Applicants.[29] Mr. Fast swears in his affidavit that he intended to copy his February 17th and February 19th letters to the Applicants and by extension, to disclose the information therein. As I indicated earlier, I believe that he intended to disclose this information at that time. However, subsequent correspondence raises a doubt about his later behaviour: if Mr. Fast intended to copy the Applicants and thereby disclose the information contained therein, why did he not mention this information when he wrote Mr. Funt on March 6, 1998? Further, why did the Band not respond to the Applicants' continual requests for information (letters of March 12, March 13, April 16, October 2, November 16, and December 8)?[30] In my opinion, Mr. Fast's failure to respond to repeated requests from the Applicants for information regarding those events leads, in my view, to a reasonable apprehension of bias.[31] In my view, under the circumstances, the Band ought to have disclosed the reasons for the resignations to the Applicants, or at least, the minutes of the February 23, 1998 meeting. The Band was aware that four members of the MIBBR felt, rightly or wrongly, that the MIBBR's independence was under siege by the Band. Considering that the Applicants are non-native residents of the Reserve with no right to vote, that their property is assessed by a Board whose members are all appointed by the Band, and that the Band is a party in the litigation, it was of the utmost importance to ensure that the MIBBR was not only independent, but that it was also perceived to be independent by all the parties. As Mr. Fast himself stated in his February 19th letter:

> In the circumstances, the Musqueam Indian Band was concerned, not withstanding its full and total belief in the integrity of both members of the Board of Review, that the average member of the Musqueam Indian Band or the public generally would perceive at least the potential for bias. Rather than risk the perception by anyone that the integrity of the Musqueam Board of Review might be compromised, the Musqueam Indian Band took the position that it was preferable to be cautious. The Musqueam Indian Band was not prepared to risk even the slightest allegation of potential bias on the part of the Board of Review.

In view of Mr. Fast's remarks, it is difficult to understand why he did not disclose the information sought regarding the resignations.

Had such disclosure occurred, a discussion about whether the four members of the MIBBR correctly perceived the situation (i.e., of ostensible interference by the Band) would then have taken place in a forum where all parties could have made submissions about the process and particularly, about the legitimacy of the MIBBR's decision to reinstate Mr. Cavazzi on the panel after he had recused himself. Why did Mr. Fast not provide the information requested by the Applicants regarding the resignations? As I indicated earlier, Mr. Fast did not address this issue in

his affidavit. However, I can think of only one reason for Mr. Fast's refusal to provide the information: he felt that he would be opening Pandora's box if he disclosed that the four members of the MIBBR resigned because they felt the Band was interfering. Accordingly, he was trying to avoid charges of reasonable apprehension of bias but in the result, his actions compounded and substantiated those charges. Hence, in my opinion, a reasonably informed person viewing the situation realistically and practically would conclude that the Band's non-disclosure of this information gives rise to a reasonable apprehension of bias because it tainted the very integrity of the process it was seeking to maintain.

The Band submits that even if a reasonable apprehension of bias exists with respect to the first panel's actions, this does not taint the independence of the second panel which actually heard the case in May and June. With respect, I disagree. It is clear from the February 23, 1998 Minutes that the four members of the MIBBR felt that their independence and that of the MIBBR was under siege by the Band. As the Minutes indicate: "Upon considering the events which have occurred, all members indicated they no longer felt comfortable participating on the Board as it appears to lack the support of the Band and its independence appears to be in question." In my view, the non-disclosure of this information would lead a reasonably informed observer to conclude that the perception of interference from the Band did not disappear with the appointment of a new panel. That is, in my opinion, a reasonably informed person, fully apprised of the MIBBR's belief that its independence was in question, would not be assuaged by the fact that a new panel had been appointed. In short, the appointment of a new panel could not cure the reasonable apprehension of bias that the Band's non disclosure generated. Accordingly, I find that the reasonable apprehension of bias due to the Band's non disclosure extends to the second panel.

Waiver

Although I have found that a reasonable apprehension of bias exists with respect to the Band's non-disclosure of Mr. Fast's February 19th letter and of the reasons for the resignations, I am also of the view that the Applicants waived their right to raise that issue. The case law clearly states that an applicant must make an allegation of reasonable apprehension of bias at the earliest possible opportunity. As the Supreme Court[32] confirmed in *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892 at 896: "The failure of the appellants to raise the issue of bias in a timely fashion constituted a waiver of the right to challenge the jurisdiction of the Tribunal on that ground. Bias must be alleged at the earliest practical opportunity." The case-law of this Court has also established that if an applicant does not raise the issue of bias at the earliest practical opportunity or does not make an objection, there is an implied waiver.[33] As Denault, J. affirmed in *Abdalrithah* v. *M.E.I.* (1991), 40 F.T.R. 306 at 308-309: "even if the facts had shown a probability of bias on the officer's part, which is not the case, the failure of the applicant's attorney to raise this issue forthwith leads to a presumption that he had given up on invoking the reasonable apprehension of bias." Similarly, in *In re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 at 110, the Federal Court of Appeal, stated:

> Correlatively, the right of the individual who apprehends bias on the part of the Tribunal before which he is brought has always been, again as I understand the jurisprudence, a right to object to being judged by the Tribunal, but a right that exists only until he expressly or impliedly submits to it. It is only because Mr. MacBain raised his objections at the outset that his attack on the proceedings could be successful.

Therefore, applicants cannot "hold on" to an allegation of bias, or "refrain" from making an objection when they believe that the circumstances give rise to a reasonable apprehension of bias. As Lord Goddard observed in *Regina* v. *Nailsworth Licensing Justices Ex parte Bird* (1953), 1 W.L.R. 1046 (Q.B. Div.) at 1048:

> The solicitor did not take his objection then and it seems clear that he decided to let the matter go on, taking the view that this was a heaven-sent opportunity of getting the order quashed if the committee found in favour of the application. That would be sufficient ground for refusing this application...

Further, as Muldoon J., aptly put it in *Kostyshyn* v. *West Region Tribal Council* (1992), 55 F.T.R. 28 at 46:

> ...[W]hen one alleges a denial of natural justice by means of alleged prejudice, one should – nay, must – so allege promptly, for effluxion of time can render such allegation not objectively demonstrable at all. The allegation of prejudice should not be secretly harboured, but made public immediately, thereby hoping to catch the tribunal "red handed", so to speak, in its prejudice and misconduct. So it is that the posture of waiting to discover whether one wins the contention before the adjudicator, prepared to make no allegation of prejudice if one does win, and complaining of alleged prejudice as a means of trying to avoid a confirmed loss, is abusive and to be discouraged.

Similarly, in this case, the Applicants did not, in my view, make an objection at the earliest practical opportunity. By letter dated April 7, 1998, Mr. Brothers gave the parties the opportunity to raise any issues of concern to them. He wrote:

> The Board does not wish to be plagued by procedural motions at the commencement of the hearings. If the parties have any further matters worrying them, then they should bring it to my attention as soon as possible, so I can obtain the opinion of the 'test case' panel.
>
> I would be pleased to hear from you at the earliest possible moment in connection with the matter raised in this letter.

The Applicants never responded to this letter, and never raised reasonable apprehension of bias as an issue. They seem to have waited until they "lost the case" to bring their allegations of reasonable apprehension of bias. I am of this view for the following reasons: first, the Applicants suspected something was amiss from the very beginning. This is reflected in the correspondence, specifically in Mr. Mickelson's February 19th letter to Mr. Fast asking "who is in charge in respect to arranging the hearing of this matter - yourself or Mr. Cavazzi"; Mr. Funt's February 27th letter to Mr. Savage asking for a "full and candid explanation... Otherwise the inference will be that the hearing process is fundamentally flawed"; Mr. Funt's March 12th letter to Mr. Fast asking for an explanation on the Band's role and saying that "a lack of any such explanation...will serve only to compound the apprehensions held by many of our clients"; Mr. Mickelson's March 13th letter to the Band (Attention: Mr. Fast) inquiring about the resignations; and Mr. Mickelson's April 16th letter to Mr. Harvey asking for a meeting between the Applicants and the Band so that they may discuss the resignations, the new appointments, and the new panel.

Despite all these requests for information concerning the reason why four members of the MIBBR resigned and the process by which the new panel was formed, when it came to the actual hearing in May 1998, the Applicants made no objection. Indeed, they affirmed their faith in the process and in the new panel. The concerns they raised seem to have been addressed or assuaged by Chairman Brothers. The transcript of the May 11, 1998 hearing shows Mr. Mickelson asking for an explanation about past events[34] but also stating that his request is not directed towards the new panel. More importantly, he expressly makes no objection. I quote the passage in full:

> Chairman Brothers: [....] Do you have any objection to us sitting as a panel?

> Mr. Mickelson: Mr. Chairman, I expressly don't have any objection whatsoever and have no concern about this Board discharging its function independently and impartially. There was one matter I was going to raise, and this seems like an opportune time, and I'll make it in view of your comments much more brief, but I thought it might be useful to briefly outline very briefly the history of what's happened since - I don't have to then, but I suppose the only concern I have isn't myself as counsel but on behalf of my clients and it's really a question of the process and one of the things that was of concern to my clients was, one, the delay in getting this back on and that was never explained. I'm not asking this Board to explain it -
>
> Chairperson: We acted with the speed of light.
>
> Mr. Mickelson: Yes. I'm just - up until April - I have no criticism of -
>
> Chairperson: I prefer not to talk about the past. I'm talking about the present and the future.
>
> Mr. Mickelson: Okay.
>
> Chairperson: What happened in the past is in the past.
>
> Mr. Mickelson: All right, Mr. Chairman, I accept that. I just - I guess I just wanted to express on behalf of my clients that hopefully in terms of the past we can deal with the future today, that there be some - not from this Board but some explanation at some stage forthcoming -
>
> Chairperson: I'll leave that up to the parties to straighten that out.
>
> Mr. Mickelson: Thank you.

In my view, this was time for the Applicants to voice the concerns they had been raising all along, and in failing to do so, they impliedly waived their right to subsequently allege that there was a reasonable apprehension of bias. Indeed, Mr. Mickelson specifically indicated that he had no qualms about the panel's independence and impartiality. The only concern he expressed was regarding delay and this seems to have been assuaged by Mr. Brothers' suggestion for the parties to deal with this.[35]

It is only in September 1998, two months after a negative decision, that the Applicants begin voicing exactly the same concerns they were raising before the May hearing. For example, on September 11, 1998, Mr. Funt wrote to Mr. Brothers and informed him that the Applicants would be holding a meeting at which the resignations of the four members of the MIBBR and the appointment of the new panel would be discussed. Moreover, on September 22, 1998, Mr. Funt wrote to Mr. Cavazzi requesting all the material pertinent to the resignations. In response, Mr. Cavazzi indicated that he had no objection to the release of the material, but suggested that the Applicants first try to obtain the information from the Band. Thus, on October 2, 1998 and November 16, 1998, Mr. Funt and Mr. Mickelson, respectively, wrote to Mr. Harvey requesting this material. When they received no response, they repeated their request to Mr. Cavazzi who provided the information on November 24, 1998.

In my opinion, the Applicants could and should have requested this information from Mr. Cavazzi well before the May hearing. Although they were not aware of the exact contents of the material, they certainly had some apprehensions about the process, as evidenced in their correspondence to the Band. Rather than waiting until September to ask Mr. Cavazzi for the information, they

could have made the same request as soon as they discovered that the four members of the MIBBR had resigned and a new panel had been appointed. Nothing prevented them from making such a request to Mr. Cavazzi or to the other MIBBR members who had resigned. Moreover, I have no reason to believe that Mr. Cavazzi would not have been as forthcoming with the information as he was in the fall; he may have asked the Applicants to make their request to the Band first, but in any case, the Applicants had the opportunity and in my view, the duty, to make their request at the earliest opportunity. Furthermore, there is no reason why the Applicants submitted to the process in May and waited until after the decision was rendered to contact Mr. Cavazzi and to make their allegations. Indeed, the Applicants' knowledge before the May hearing and after the May hearing is exactly the same; they had apprehensions about the process from the beginning. No new facts came to light during or after the May hearing which goaded or triggered the Applicants' request for the information. In short, had they asked earlier, the Applicants could have accessed, before the commencement of the hearing in May, the same information they obtained in November 1998.

Consequently, given this set of facts, I find that the Applicants waived their right to subsequently object to the process and to raise allegations of reasonable apprehension of bias.

Conclusion

For the above noted reasons, this application for judicial review shall be dismissed. The parties may speak to me, within the next 60 days, on the issue of costs.

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[1] **83.** (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,
(a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve.
[2] The Assessor is the British Columbia Assessment Authority, represented by Mr. John Savage.
[3] Judge Scow is a retired Provincial Court judge from British Columbia.
[4] Mr. Clark was elected to a time-consuming position with the Appraisal Institute of Canada which limited his availability on the MIBBR.
[5] Mr. Fast is the Band's in-house counsel. His co-counsel on this case, Mr. Lewis F. Harvey, is a lawyer with Davis & Co. in Vancouver.
[6] On November 12, 1997, Mr. Cavazzi suggested to Mr. Fast that Mr. Gordon be appointed to the MIBBR.
[7] Mr. Cavazzi was Chair of the MIBBR and also, of the panel which convened for the January 14th hearing.
[8] As the Chairman indicated: "I think in view of the comments made by the respondents in the case in terms of having an objection to two members of the Board-the bylaws require a three member panel to hear any appeal...I don't think this Board has any recourse but to stand down...I think the result of it though is that the hearing is adjourned to a future date and I guess there will be a new panel and I'm sorry to say that ends it rather abruptly" (Proceedings adjourned).
[9] Namely, Judge Scow, Mr. Cavazzi, and Mr. Clark.
[10] In a letter dated February 20, 1998, Mr. Savage wrote to Mr. Funt and reiterated what Mr. Fast stated in his February 19th letter-namely, that once the panel recused itself, it could not then reinstate itself.
[11] In his affidavit, Mr. Fast affirms that he only became aware of Mr. Cavazzi's February 10th letter on February 19th, following a discussion with Mr. Savage.
[12] Namely, Judge Scow, Mr. Clark, Mr. Brothers, and Ms. Roberts.
[13] During the hearing, I was informed that Mr. Brothers and Ms. Roberts were not given notice of this meeting.
[14] i.e., Mr. Fast's February 17th and 19th letters.
[15] The new MIBBR members were appointed (Feb. 16) before the original panel members resigned (Feb. 23 minutes, followed by letters of resignation in early March). According to the Applicants, this suggests that the Band had decided to override Judge Scow's opinion which provided that Mr. Cavazzi could sit on the panel.
[16] No such meeting was ever held.
[17] Parag. 31 of Mr. Fast's affidavit.
[18] *Giesbrecht* v. *Canada* (1998), 148 F.T.R. 81; *Mackie* v. *Canada*, [1998] 1 F.C. 219; *Anderson* v. *Canada (Minister of National Defence)* [1997] 1 F.C. 273 (C.A.); *Pisces Marine Ltd.* v. *Canada (Minister of Fisheries and Oceans)*, [1997] F.C.J. No. 1388; *Rae* v. *Canada (A.G.)*, [1995] F.C.J. No. 1269.
[19] *Canadian Pacific Ltd.* v. *Matsqui Band*, [1995] 1 S.C.R. 3 (*"Matsqui"*).
[20] *Matsqui, supra.*
[21] *C.D. Lee Trucking Ltd.* v. *Industrial Wood and Allied Workers of Canada*, [1998] B.C.J. No. 2776.
[22] The test for reasonable apprehension of bias is unquestionably established, as I will refer in the upcoming section on Principles from the Case-law, by de Grandpre J. in *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369.

[23] I agree with the Chief Justice's reasons. In my view, Sopinka J. seems to be advocating a "wait and see" approach without sufficiently considering how a framework can contain inherent flaws which would lead to a reasonable apprehension of bias.
[24] In our case, therefore, where the Board is guaranteed tenure and remuneration, the only issue is whether the appointment of the Board by the Band in and of itself creates a reasonable apprehension of bias.
[25] The appointment occurred on February 16, 1998, while the resignations occurred on February 23, 1998.
[26] Mr. Getz, Mr. Brothers, Ms. Roberts and Mr. Sparks.
[27] Mr. Fast and Mr. Savage do not take issue with the substance or content of Judge Scow's opinion, but with the authority and jurisdiction of the MIBBR to obtain that opinion.
[28] I again wish to emphasize that the Band and the Assessor did not dispute Judge Scow's opinion on the merits. Their challenge was simply directed to Judge Scow's jurisdiction to give an opinion considering that two MIBBR members had recused themselves at the January 14, 1998 meeting.
[29] I found that Mr. Fast's failure to copy his letter did not give rise to a reasonable apprehension of bias, given that Mr. Savage's letter had brought the same issue to the fore. However, in this section, I am dealing with the issue of the Band's non-disclosure of information.
[30] For the purposes of this section, the letters sent before the hearing are the relevant correspondence.
[31] It is noteworthy that in his affidavit, Mr. Fast does not address why he did not subsequently disclose the information.
[32] Three members of the Court dissented in part in this decision, but they agreed with the majority's statement that one must raise bias at the earliest practical opportunity.
[33] Please see also: *Del Moral* v. *M.C.I.,* (1998), 46 Imm. L.R. (2d) 98, *Hernandez* v. *M.C.I.,* [1999] F.C.J. No. 607, *Nartey* v. *M.E.I.* (1994) F.T.R. 74.
[34] Mr. Funt made no comments on this issue. The first time he speaks, he asks about the evidence the Band intends to bring. This assumes that he accepts the process.
[35] There is no evidence that the Applicants ever attempted to "straighten things out" or that they raised the issue of delay again.