Court File No.: CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE "A" HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE "B" HERETO, TO BE BOUND BY THE RESULT

Responding Book of Authorities of Schonfeld Inc.

(Respondents' Motion for Recusal Returnable March 10, 2016)

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2003 SCC 45
Supreme Court of Canada

Roberts v. R.

2003 CarswellNat 2822, 2003 CarswellNat 2823, 2003 SCC 45, [2003] 2 S.C.R. 259, [2003] S.C.J. No. 50, [2004] 1 C.N.L.R. 342, [2004] 2 W.W.R. 1, 19 B.C.L.R. (4th) 195, 231 D.L.R. (4th) 1, 309 N.R. 201, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, J.E. 2003-1819, REJB 2003-47809

Roy Anthony Roberts, C. Aubrey Roberts and John Henderson, suing on their own behalf and on behalf of all other members of the Wewaykum Indian Band (also known as the Campbell River Indian Band), Appellants v. Her Majesty The Queen, Respondent and Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu and James D. Wilson, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band), Respondents/Appellants

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu, Godfrey Price, Allen Chickite and Lloyd Chickite, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band), Appellants v. Her Majesty The Queen, Respondent and Attorney General of Ontario, Attorney General of British Columbia, Gitanmaax Indian Band, Kispiox Indian Band and Glen Vowell Indian Band, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel, Deschamps JJ.

Heard: June 23, 2003
Judgment: September 26, 2003
Docket: 27641

Counsel: Michael P. Carroll, Q.C., and Malcolm Maclean for appellants Roy Anthony Roberts et al.
John D. McAlpine, Q.C., and Allan Donovan for respondents/appellants Ralph Dick et al.
J. Vincent O'Donnell, Q.C., and Jean Bélanger for respondent Her Majesty the Queen
Patrick G. Foy, Q.C., and Angus M. Gunn, Jr. (written submissions only), for intervener Attorney General of British Columbia

Peter Grant and David Schulze (written submissions only) for interveners Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band

Subject: Civil Practice and Procedure; Public

MOTION by native bands to set aside judgment reported at *(*sub nom. *Wewaykum Indian Band v. Canada)* [2002] 4 S.C.R. 245, 2002 SCC 79, 2002 CarswellNat 3438, 2002 CarswellNat 3439, 220 D.L.R. (4th) 1, 297 N.R. 1, [2003] 1 C.N.L.R. 341 (S.C.C.), affirming 1999 CarswellNat 2064, [1999] F.C.J. No. 1529, 27 R.P.R. (3d) 157, 247 N.R. 350, 171 F.T.R. 320 (note), (sub nom. *Roberts v. Canada*) [2000] 3 C.N.L.R. 303 (Fed. C.A.), reversing in part [1995] F.C.J. No. 1202, 1995 CarswellNat 1892, 99 F.T.R. 1 (Fed. T.D.), for reasonable apprehension of bias.

***Per curiam*:**

I. Introduction

1 The Wewaykum or Campbell River Indian Band ("Campbell River") and the Wewaikai or Cape Mudge Indian Band ("Cape Mudge") allege that the unanimous judgment of this Court in *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), with reasons written by Justice Binnie, is tainted by a reasonable apprehension of bias and should be set aside. The alleged reasonable apprehension of bias is said to arise from Binnie J.'s involvement in this matter in his capacity as federal Associate Deputy Minister of Justice over 15 years prior to the hearing of the bands' appeals by this Court.

2 An allegation that a judgment may be tainted by bias or by a reasonable apprehension of bias is most serious. That allegation calls into question the impartiality of the Court and its members and raises doubt on the public's perception of the Court's ability to render justice according to law. Consequently, the submissions in support of the applicant bands and the other parties have been examined in detail as reflected in the following reasons.

3 After an analysis of the allegations and the record upon which they are based, all of which is attached as Appendix A to these reasons, we have concluded that no reasonable apprehension of bias is established and hence that Binnie J. was not disqualified. The involvement of Binnie J. in this dispute was confined to a limited supervisory and administrative role, over 15 years prior to the hearing of the appeals. In his written statement filed as part of the record, Binnie J. has stated that he has no recollection of any involvement in this litigation, and no party disputes that fact. In light of this and for the reasons which follow, we are of the view that a reasonable person could not conclude that Binnie J. was suffering from a conscious or unconscious bias when he heard these appeals, and that, in any event, the unanimous judgment of this Court should not be disturbed. Accordingly, the motions to set aside this Court's judgment of December 6, 2002, are dismissed.

II. Factual Background

4 The bands have each presented motions to set aside the unanimous judgment of this Court, dated December 6, 2002, with reasons written by Binnie J. The judgment dismissed their appeals from an order of the Federal Court of Appeal. The motions to set aside allege that Binnie J.'s involvement as federal Associate Deputy Minister of Justice in the early stages of Campbell River's claim in 1985 and 1986 gives rise to a reasonable apprehension of bias by properly informed and right-thinking members of the public. These motions were brought following an application by the Crown in right of Canada for directions and were heard on June 23, 2003. Binnie J. had recused himself from any participation in this process after filing a statement as part of this record indicating that he had no recollection of participating in the litigation process involving these claims while serving in the Department of Justice.

5 Prior to his appointment to the Supreme Court of Canada in 1998, Binnie J. had a long and varied career as a practising lawyer. Called to the Ontario Bar in 1967, Binnie J. practised litigation with Wright & McTaggart and successor firms until 1982. Between 1982 and 1986, and of most relevance to these motions, Binnie J. served as Associate Deputy Minister of Justice for Canada, having joined the federal civil service on a secondment. As Associate Deputy Minister of Justice, Binnie J. was responsible for all litigation involving the government of Canada, except cases originating from the province of Quebec and tax litigation. He also had special responsibilities for aboriginal matters. Upon leaving the Department of Justice on July 31, 1986, Binnie J. joined the firm of McCarthy Tétrault, where he remained until his appointment to this Court. Understandably, when Binnie J. left the Department of Justice, the files he worked on, in accordance with usual practice, remained with the Department of Justice. As a result, in the absence of recollection, judges who leave their firms or institutions do not have the ability to examine their previous files in order to verify whether there has been any prior involvement in a matter coming before them.

6 To distinguish between his role as judge and as Associate Deputy Minister, Justice Binnie is referred to in these reasons as Binnie J. and Binnie respectively.

A. The Original Appeals

7 To understand the allegations of reasonable apprehension of bias, it is necessary to examine the factual and procedural background of this case. Campbell River and Cape Mudge are sister bands of the Laich-kwil-tach First Nation. Since the end of the 19th century, members of each band have inhabited two reserves located a few miles from each other on the east coast of Vancouver Island. In particular, members of Campbell River inhabit Reserve No. 11 (Campbell River) and members of Cape Mudge inhabit Reserve No. 12 (Quinsam). In 1985 and 1989 respectively, Campbell River and Cape Mudge instituted legal proceedings against each other and the Crown. In these proceedings, each band claimed exclusive entitlement to both Reserves Nos. 11 and 12.

8 The bands' claims rely on a historical review of the process that led to the creation of the two reserves. In 1888, Mr. Ashdown Green, a federal government surveyor, recommended the creation

of these reserves. In his report, however, he did not allocate the reserves to a particular band but rather to the Laich-kwil-tach Indians. The first Schedule of Indian Reserves, published in 1892 by the Department of Indian Affairs, listed Reserves Nos. 11 and 12 as belonging to Laich-kwil-tach Indians without any indication of how the reserves were to be distributed between the bands of the Laich-kwil-tach Indians. By 1902, the Schedule indicated that both reserves were allocated to the "Wewayakay" (Cape Mudge) Band. The Schedule allocated Reserves Nos. 7 through 12 to Cape Mudge. The name of the Cape Mudge Band ("Wewayakay") was written in the entry corresponding to Reserve No. 7. Ditto marks were used to reproduce the same reference for entries corresponding to Reserves Nos. 8 through 12.

9 The allocation of Reserve No. 11 to Cape Mudge created difficulties. Cape Mudge was not and had never been in possession of Reserve No. 11. Members of Campbell River had occupied the reserve for several years to the exclusion of Cape Mudge. In 1905, a disagreement between the two bands over fishing rights in the Campbell River led to a dispute over possession of Reserve No. 11. In 1907, this dispute was settled by a resolution in which Cape Mudge ceded to Campbell River any claim to Reserve No. 11, subject to retaining fishing rights in the area. This resulted in the Department of Indian Affairs modifying the 1902 Schedule of Indian Reserves by marking "We-way-akum band" (Campbell River) in the entry corresponding to Reserve No. 11. By inadvertence, the "ditto marks" in the subsequent entry corresponding to Reserve No. 12 were not altered creating the erroneous appearance that Reserve No. 12 was also allocated to Campbell River. However, the alteration of the Schedule was intended to refer only to Reserve No. 11 and there was no intention to make any change to Reserve No. 12.

10 In 1912, the McKenna McBride Commission was established to address continuing disagreements between the federal and provincial governments about the size and number of reserves in British Columbia. The Commission acknowledged that Reserve No. 11 was properly allocated to Campbell River but noted the irregularity that was the source of the confusion with respect to Reserve No. 12. Nevertheless, the Commission made no alteration to the Schedule so that matters remained with Cape Mudge occupying Reserve No. 12 and Campbell River occupying Reserve No. 11 subject to the fishing rights in the waters of the Campbell River given to Cape Mudge.

11 The McKenna McBride Report did not receive approval by the province. Both the provincial and federal governments then established the Ditchburn Clark Commission to resolve the outstanding federal-provincial disagreements. In its 1923 report, the Ditchburn Clark Commission restated the position proposed in the McKenna McBride Report concerning Reserves Nos. 11 and 12. In 1924, both levels of government adopted the McKenna McBride recommendations as modified by the Ditchburn Clark Commission. In 1938, a provincial Order-in-Council was issued, transferring administration and control of the reserve lands to the federal Crown.

12 In the 1970s, a dispute between the bands resurfaced. Eventually, in December 1985, Campbell River started an action against the Crown and Cape Mudge in the Federal Court. It claimed that the Crown had acted in breach of its fiduciary duty, had acted negligently, had committed fraud, equitable fraud and deceit, and had breached and continued to breach statutory duties owed to Campbell River. Campbell River further claimed that Cape Mudge had trespassed and continued to trespass on Reserve No. 12. In 1989, Cape Mudge counterclaimed against Campbell River and brought its own claim against the Crown. Cape Mudge claimed that the Crown had breached its fiduciary duty, duty of trust and statutory duties under the *Indian Act*, R.S.C. 1985, c. I-5. Each band thus claimed both reserves for itself, but sought compensation from the Crown as relief rather than dispossession of either band from their respective Reserves Nos. 11 and 12.

13 The two joined actions were heard together in the Federal Court - Trial Division by Teitelbaum J. The trial lasted 80 days and the actions were dismissed on September 19, 1995 (99 F.T.R. 1 (Fed. T.D.)). The bands appealed to the Federal Court of Appeal. By unanimous judgment the appeals were dismissed on October 12, 1999 (247 N.R. 350 (Fed. C.A.)).

14 The bands applied for and were granted leave to appeal on October 12, 2000, [2000] 2 S.C.R. xii (S.C.C.). The appeals were heard by the full Court on December 6, 2001. On December 6, 2002, in reasons written by Binnie J. and concurred in unanimously, the appeals were dismissed. The Court held that the Crown had not breached its fiduciary duty to either band. In any event, it found that the equitable defences of laches and acquiescence were available to the Crown. As well, the Court concluded that the bands' claims were statute-barred under the applicable statutes of limitations.

B. The Access to Information Request

15 In February 2003, a request under the *Access to Information Act*, R.S.C. 1985, c. A-1, made by Campbell River was received by the Department of Justice. The request sought:

> . . . copies of all records, including letters, correspondence and internal memoranda to, from or which make reference to Mr. William Binnie (Ian Binnie) [now Justice Binnie] in the matter of the claim against Canada by the Wewaykum (or Campbell River) Indian Band and the Wewaikai (or Cape Mudge) Indian Band for Quinsam IR 12 and Campbell River IR 11 between the years 1982 and 1986.

16 During the hearing of these motions, counsel for Campbell River explained the origin of the access to information request. Subsequent to the release of the Court's reasons, the band's solicitor, Mr. Robert T. Banno, reviewed the reasons with the band and, as stated by its counsel, the band was upset both by the tone and the result of the appeal. Counsel for Campbell River stated that:

> They were upset, quite frankly, with the tenor of the reasons in the sense that the claim had been dismissed; some of the words used were "a paper claim". And in effect they thought, as parties sometimes feel when they lose cases, that their arguments had not been properly addressed.

17 Counsel for Campbell River offered the following explanation as to why an unsuccessful litigant would be unusually inclined to present an access to information request about one of the authors of the reasons of the Court:

> Now, one could look at the FOI [freedom of information] request and could sort of infer something from it other than perhaps a proper - well, something improper about doing it. In my submission, what happens if a client is upset, an FOI request may be the very thing to satisfy that client or that litigant that everything is fine. I mean that may be the type of situation that comes back - the FOI request comes back with nothing and the client is satisfied. Well, the chips fall where they fall . . . .
>
> . . . in something like this, in sitting down with a client and - a litigant and explaining what has happened, this is the kind of thing that helps explain what has happened. You say, look, there is nothing untoward here, everything is above board.
>
> . . . in my submission, there should be no improper motive at all attributed to the filing of that information. That sometimes helps lawyers explain to litigants, helps quell those kinds of concerns.

18 Counsel for Campbell River offered this explanation as a rejection of any suggestion that Binnie J.'s involvement in the band's claim as Associate Deputy Minister in the Department of Justice many years previous was suspected prior to or during the hearing before this Court but only investigated subsequently when a negative decision was rendered.

C. Results of the Access to Information Request

19 Pursuant to the access to information request, the Department of Justice found a number of internal memoranda to, from or making reference to Binnie and related to Campbell River's claim. These memoranda show that in late 1985 and early 1986. Binnie, in his capacity at that time as Associate Deputy Minister of Justice, received some information and attended a meeting in the early stages of Campbell River's claim. On May 23, 2003, the Assistant Deputy Attorney General, James D. Bissell, Q.C., wrote the Registrar of the Supreme Court of Canada to inform her that, as a result of the preparation of the Department's response to the access to information request, it appeared "that Mr. W.I.C. Binnie in 1985 and early 1986, in the course of his duties as Associate Deputy Minister of Justice, participated in discussions with Department of Justice counsel in the *Wewaykum* [Campbell River] *Indian Band* case."

20 Accompanying Assistant Deputy Attorney General Bissell's letter to the Registrar were several documents, dated between 1985 and 1988, referring to Mr. Binnie and the Campbell River claim against Canada in regard to Reserves Nos. 11 and 12. Assistant Deputy Attorney General Bissell advised the Registrar that, in view of its duty as an officer of the Court, the Department was waiving solicitor-client privilege to these documents and that they would be provided to the requester under the *Access to Information Act*. He also advised that the Department intended to file a motion for directions, pursuant to R. 3 of the *Rules of the Supreme Court*, as to what steps, if any, should be taken by reason of the information found in his letter. Attached to the letter was a Statement setting forth the following factual information that is part of the motion record:

> 1. The case of *Roberts v. R.*, [2002] SCC 79, file no. 27641 was heard in the Supreme Court of Canada in December 6, 2001 and judgment was rendered December 6, 2002.
>
> 2. The original claim in the case was filed in December 1985 and the original Defense on behalf of the Crown was filed on February 28, 1986.
>
> 3. The trial judgment was released by the Federal Court Trial Division on September 19, 1995 and the appeal judgment was released on October 12, 1999 by the Federal Court of Appeal.
>
> 4. Mr. W.I.C. Binnie was Associate Deputy Minister of Justice from September 2nd, 1982 until July 31st, 1986; at that time he left the Department of Justice and entered private practice.
>
> 5. As Associate Deputy Minister, Mr. Binnie's duties included responsibility for all litigation, civil as well as criminal matters, involving the Government of Canada as a party, arising in the common law provinces and territories of Canada; in that context he would have had under his general supervisory authority thousands of cases. In addition to his responsibilities for litigation, Mr. Binnie was also responsible for Native Law in the Department.
>
> 6. In the course of the preparation of a response to a request for information under the *Access to Information Act* received in February 2003, it has come to light that Mr. Binnie had occasion to discuss the case with Department counsel, in late 1985 and early 1986.
>
> 7. In the course of preparing for the hearing of the case before the Supreme Court of Canada, Department of Justice counsel noted the fact of Mr. Binnie's position as Associate Deputy Minister in 1985 and 1986, and asked themselves whether Mr. Binnie had had any specific involvement in the case.

> 8. Counsel did not conduct a thorough examination of the files. Consequently, Mr. Binnie's involvement was not discovered by counsel at that time.

21 Copies of Assistant Deputy Attorney General Bissell's letter, the Statement and the documents were provided to counsel for the other parties and the interveners.

D. The Motion for Directions

22 The Crown served and filed a motion for directions on May 26, 2003, on the following grounds:

> 1. Judgment in this appeal was handed down on December 6, 2002. The appeal from the Federal Court of Appeal was unanimously dismissed (9:0). The Honourable Mr. Justice Binnie wrote the decision;
>
> 2. It has recently come to the attention of counsel for the Respondent, Her Majesty the Queen, that in 1985 and 1986, when Mr. Justice Binnie was Associate Deputy Minister of Justice (Litigation), he had been involved in some of the early discussions within the Department of Justice regarding the proceeding that eventually came before the Court as this appeal;
>
> 3. The Respondent therefore brings this motion in order to formally place this fact before the Court, and to ask this Court for directions as to any steps to be taken.

23 Produced with the motion for directions were the documents referring to Mr. Binnie while in the employ of the Department of Justice and Campbell River's claim in relation to Reserves Nos. 11 and 12. Upon receipt of the motion by the Court, Binnie J. recused himself from any further proceedings on this matter and, on May 27, 2003, filed the following statement with the Registrar of the Supreme Court:

> With respect to the Motion for Directions filed yesterday by the Crown, would you please place this note on the Court file and communicate its contents to counsel for the parties.
>
> It is a matter of public record that between September 1982 and July 1986 I was Associate Deputy Minister of Justice responsible for all litigation for and against the federal Crown except tax matters and cases in Quebec. This included Indian claims. At any given time, the responsibility covered several thousand cases.
>
> When this appeal was pending before the Court in 2002, I had no recollection of personal involvement 17 years earlier at the commencement of this particular file, which was handled by departmental counsel in the Vancouver Regional Office.

> I do not recall anything about any involvement in this case to add to what is set out in the departmental file.
>
> I recuse myself from consideration of the pending motion.

24 The Court invited further submissions by the parties with respect to the Crown's motion for directions. The Crown filed a memorandum in which it submitted that there was no reasonable apprehension of bias affecting the Court's judgment as a result of Binnie J.'s employment in the Department of Justice and involvement in this matter some 17 years earlier and for which he had no recollection. In response, Cape Mudge sought an order setting aside the Court's judgment of December 6, 2002, and requesting that the Court recommend that the parties enter into a negotiation and reconciliation process. In the alternative, Cape Mudge sought an order suspending the operation of the judgment for a period of four months to permit negotiation and reconciliation between the parties with further submissions to the Court, if required.

25 Campbell River, for its part, sought an order vacating the Court's judgment of December 6, 2002, and the reasons for judgment, as well as an order permitting a further application for relief in the event the Supreme Court's decision was vacated. The Crown opposed both motions. It also opposed Cape Mudge's submission that further negotiation would be an appropriate remedy in this matter.

26 The Attorney General of British Columbia, an intervener, submitted that there was no reasonable apprehension of bias and that the motions to vacate should be dismissed.

27 Several other interveners, being the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band, submitted that the Court's judgment should be vacated.

E. Details of Binnie J.'s Involvement in the Appellants' Litigation 1985-86

28 We turn now to the documents produced by the Crown in order to determine the nature and extent of Binnie's involvement in the Campbell River claim in 1985-1986. Seventeen documents were produced by the Crown. As noted previously, the documents are reproduced in their entirety in the *Appendix*. All documents were shown to or seen by Binnie in his official capacity as Associate Deputy Minister of Justice. Where relevant, the documents relate to the Campbell River claim. Cape Mudge's claim was commenced in 1989, several years after Binnie left the Department of Justice. As can be seen, the 17 documents include one letter and 16 internal memoranda. The letter, dated May 23, 1985, is from Binnie to Chief Sol Sanderson of the Federation of Saskatchewan Indian Nations and is obviously not relevant to these motions. Of the remaining 16 documents, two were produced twice; they are the memorandum dated December 13, 1985, and the memorandum dated February 25, 1986, from Ms Mary Temple to Binnie. Consequently, 14 documents require examination, which will be done in chronological order.

29 Memorandum No. 1, dated June 19, 1985, is a memo to file written by Ms Temple, Acting Senior Counsel, Office of Native Claims. The memorandum refers to Binnie by reason of the fact that it includes a reference to his letter of May 23, 1985, to Chief Sanderson. The memorandum does not detail any involvement of Binnie in the Campbell River claim and is of no relevance to these motions.

30 Memorandum No. 2, dated August 9, 1985, is from Ms Temple to Binnie. The memo predates Campbell River's statement of claim. It indicates that an issue raised by the Campbell River claim and another matter known as the Port Simpson claim were referred to Mr. Tom Marsh of the Vancouver Office for his opinion. The memo further states that Mr. Marsh's opinion would not be ready before the middle of September. It concludes with a request to be informed of any further communications with respect to the Port Simpson opinion from Band representatives.

31 Memorandum No. 3 also predates Campbell River's statement of claim. It is from Mr. R. Green, General Counsel in the Department of Indian Affairs and Northern Development, to Binnie and is dated October 11, 1985. This memo, which relates to the Campbell River and Port Simpson claims, was prepared for a meeting between Binnie and Mr. Green to discuss a legal issue "which potentially touches on all claims from B.C. bands, or at least all involving a determination of rights and liabilities arising out of the pre-McKenna/McBride period." The memo addresses the gazetting of notices and reserve creation in British Columbia. In his memo, Mr. Green refers to the work of Mr. Marsh and sets out three likely interpretations of the B.C. legislation:

> 1. no reserve is legally established until the notice is Gazetted;
>
> 2. the Gazetting provision is for the purpose of land banking;
>
> 3. the Gazetting process is a condition precedent to transferring administration and control of reserves to the federal government but not to the creation of the Indian interest.

32 A handwritten note on the margin, presumably from Mr. Green to Binnie, reads: "On the surface argument 3 seems to be the least damaging way to go."

33 Memorandum No. 4, dated December 12, 1985, is from Mr. Duff Friesen, General Counsel, Civil Litigation Section, to Binnie. In it, Mr. Friesen proposes that Campbell River's statement of claim, filed on December 2, 1985, be referred to the Vancouver Regional Office of the Department of Justice. In a handwritten note on the memo, Binnie wrote "I agree."

34 Memorandum No. 5, dated December 13, 1985, is from Ms Temple to Mr. G. Donegan, General Counsel - Vancouver Regional Office, and copied to Binnie. The memo indicates that Campbell River had filed a statement of claim and intended to proceed by way of litigation rather than negotiation under the Department of Indian Affairs policy. The memo also indicates that

certain aspects of the claim were the subject of correspondence with Mr. Marsh of the Vancouver Regional Office and were also discussed with Binnie in Ottawa. With respect to these discussions, Ms Temple wrote that:

> In particular, Ian Binnie formed the opinion that the McKenna McBride report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's Reserve, should be taken at its face value notwithstanding the apparent fact that the designation of the Reserve for this band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information.

35 Memorandum No. 6, dated January 14, 1986, is from Binnie to Ms Temple. It acknowledges receipt of Memorandum No. 5 and sets out the above-quoted passage from that memorandum. Binnie then wrote:

> I recall some discussion about this, but not in the raw terms you have stated it. Could you let me have a note setting out the factual circumstances of the case and the legal points addressed in our discussion and any other relevant legal points you think should be considered?

36 Memorandum No. 7, dated January 15, 1986, is from Binnie to Mr. Harry Wruck of the Vancouver Regional Office. In it Binnie wrote that he is delighted with the assignment of this matter to Mr. Bill Scarth (now Scarth J.). He further asks to be informed of anything that the Minister should be made aware of.

37 Memorandum No. 8, dated January 20, 1986, is from Ms Temple to Binnie in response to Memorandum No. 6. In this memo, Ms Temple describes the factual background of Campbell River's claim. She concludes the memo with the following description of their discussions in relation to the claim:

> In our discussion of this claim in October 1985, we spent most of the time on another legal issue. However, when we turned to the issue of the effect of the McKenna McBride Commission report vis a vis Reserves No.'s 11 and 12, you indicated that such a qualification of the apparent terms of the McKenna McBride Report, as suggested by me, should not be supported and that a report should be accepted on its face so as to result in the legal vesting of an interest for the Campbell River Band only in these two reserves. My understanding of your reasons for such a position was that if we started to qualify the face of the record in any way, we would call into question other aspects of the McKenna McBride exercise.
>
> The other issue on which we spent most of our time during the October discussion was in relation to the question of the effect of the B.C. Land Act Legislation on the establishment of Reserves during the time of the nineteen [*sic*] century reserve commissions. In particular, one interpretation of this legislation would have confirmed the necessity of publishing in the B.C. Gazette the decision of the B.C. Government or officials authorized by it to establish reserves

> for bands before a band could be considered to have a vested interest in such a reserve. We concluded that notwithstanding the basis for such an interpretation, we should maintain the position that at least with respect to the Campbell River and Quinsam Reserves there was no requirement to gazette notices of those reserves before they could be considered to have been established. The legislation in question was somewhat ambiguous and our decision reflected an attempt to support an interpretation which was, of course, reasonably arguable but which also was reflective of the treatment of these reserves during the period preceeding [*sic*] the McKenna McBride report implementation.

As indicated in the above-quoted passage, the discussions referred to by Ms Temple occurred in October 1985, before Campbell River filed its statement of claim and while the parties were still in the negotiation process.

38 Memorandum No. 9 is dated February 25, 1986, and is also from Ms Temple to Binnie. The memo transmits to Binnie a copy of Campbell River's statement of claim. The memo clarifies that when Binnie participated in discussions in this case "it was still in the ONC [Office of Native Claims] claims process and before the Campbell River Band decided to proceed with litigation." The memo further advises that Mr. Scarth, who had earlier been retained and had carriage of the action, had been instructed to file a full defence. Ms Temple also indicates in her memo that:

> I would just like to note for your information that a full defense of the action by the Crown might involve the Crown in arguing some qualification or interpretation of the implementation of the McKenna McBride Report which was a position which in our discussions respecting negotiation of the claim you advised against. It seemed to Bob Green and I [*sic*] and to the Departmental officials that such a defense in the context of this court action was, nevertheless, justified.

39 Memorandum No. 10 is also dated February 25, 1986, and is from Ms Temple to Mr. Scarth. The memo conveys instructions to file a full statement of defence. The following passage from this memo relates to Binnie's involvement in discussions relating to the claim:

> Since such a defense might result in legal arguments which involve "going behind" the face of the McKenna McBride decisions as implemented by the legislation and Orders in Council, these instructions are being communicated to Ian Binnie because when the Government position respecting the claim was initially discussed with him, he advised that, at least, in the claims process we should not challenge the McKenna McBride report itself.

40 Memos 8, 9 and 10 establish that any advice given by Binnie in relation to the preferred treatment of the McKenna McBride Report was offered in the context of the negotiation process not litigation. Indeed, Binnie's advice, in the context of the negotiation towards a settlement of Campbell River's claim, is what led to acceptance of the claim as valid for the purposes of negotiation. In Memorandum No. 9, Ms Temple wrote:

> When we discussed the position the Crown should take for the purpose of negotiating a settlement under the claims process, we decided to recommend acceptance of the Campbell River Band's claim for negotiation since to do otherwise would suggest that the implementation of the McKenna McBride Report was ineffective to vest Reserve No. 12 in the Campbell River Indian Band. At the time, this position was understood to be justified since although both on legal issues and factual issues the claim was debatable, there seem to be sufficiently reasonable arguments to support it so as to justify settlement, at least on a pro-rated basis, especially since it would presumably have involved a surrender by the Campbell River Band and therefore a clarification of the interest of the Cape Mudge Band in the Reserve.

41 Memorandum No. 11, dated February 27, 1986, is from Ms Temple to Ms Carol Pepper, Legal Counsel - Specific Claims Branch Vancouver. The memo transmits to Ms Pepper a number of opinions culled from the Campbell River claim file. In this memo, Ms Temple writes that her opinions eventually reflected Ian Binnie's preferred position "to not 'go behind' the McKenna McBride Report."

42 Memorandum No. 12, dated March 3, 1986, is from Mr. Scarth to Binnie. The memo transmits to Binnie a copy of the statement of defence presumably prepared by Mr. Scarth and filed on behalf of the Crown on February 28, 1986. In this memo, Mr. Scarth indicates that he believes that the defence reflects the positions of both Justice and Indian Affairs. He further indicates that he has attempted not to repudiate the McKenna McBride Commission Report.

43 Memorandum No. 13, dated March 5, 1986, is from Binnie to Ms Temple and is in response to Memorandum No. 9. In this memo, Binnie wrote:

> With respect to the treatment of the McKenna McBride Report, I suggest that we all await the advice of Bill Scarth as to how this aspect of our possible defence should be dealt with. So far as I am concerned Bill Scarth is in charge of the file. I am sure he will take note of the view expressed by you and Bob Green and "departmental officials" that it would be appropriate in the Crown's defence to argue some qualification or interpretation of the implementation of the McKenna McBride Report.
>
> I look forward to hearing Bill Scarth's views on this aspect of the matter in due course. We will then decide what to do.

44 Memorandum No. 13 is the last document evidencing Binnie's involvement in this matter. As conceded by the parties, the Court's determination of the extent of Binnie's involvement in the Campbell River claim is limited by the documentary record produced by the Crown. The record does not disclose any further involvement on Binnie's part and, in particular, no involvement in this matter between March 5, 1986, and his departure from the Department of Justice on July 31, 1986.

45 Finally, Memorandum No. 14 is dated February 3, 1988, after Binnie left the Department of Justice, and is from Mr. Scarth to Mr. E.A. Bowie, Q.C., Assistant Deputy Attorney General (now Bowie J.). In this memo, Mr. Scarth provides a summary of the Campbell River case to Mr. Bowie. In the body of his memo, Mr. Scarth writes:

> I point out, parenthetically, that Ian Binnie, during his time as Associate Deputy Minister, suggested, because of its wider impact, that we not challenge the validity of what was done by the Royal Commission. With respect, I continue to concur with that advice, and suggest it is a question of defining more narrowly what the Commission did, at least insofar as the Reserves in question are concerned.

III. The Parties' Arguments

A. Cape Mudge, Campbell River and the Interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band

46 Campbell River and Cape Mudge both agree that actual bias is not at issue. Neither band makes any submission that actual bias affected Binnie J., the reasons for judgment or the judgment of the Court. Both bands unreservedly accept Binnie J.'s statement that he had no recollection of personal involvement in the case. The bands submit, however, that the material disclosed by the Crown gives rise to a reasonable apprehension of bias.

47 Cape Mudge submitted that Binnie J.'s involvement in Campbell River's claim was so significant that he effectively acted as a senior counsel for the Crown and that he was disqualified on account of the principle that no judge should sit in a case in which he or she acted as counsel at any stage of the proceeding. According to Cape Mudge, the disclosed documents reveal that Binnie J. was actively involved in risk analysis and the development of litigation strategy on behalf of the defendant Crown. Cape Mudge submitted that Binnie J.'s involvement in the litigation while he was Associate Deputy Minister of Justice raises legitimate questions as to whether the positions he formulated and recommended and the various memoranda and documents he read would have had an influence on his approach to the same case as a judge. In Cape Mudge's submission, such influence could well be unconscious and Binnie J.'s lack of recollection does not change the fact that he was involved in a significant and material way. According to Cape Mudge, the fact that Binnie J. was involved as a lawyer for the defendant Crown, combined with the fact that some 15 years later he wrote a judgment in the same litigation that freed the Crown of potential liability, gives rise to a reasonable apprehension of bias. Cape Mudge submitted that had the documents disclosed by the Crown come to light prior to the hearing before the Court, Binnie J. would have recused himself from the hearing of the appeals.

48 Campbell River submitted that the test for reasonable apprehension of bias is met where a judge sits in a case in which he or she has had any prior involvement. In Campbell River's view,

the documents disclosed by the Crown indicate that Binnie J.'s prior involvement in the band's claim was substantial. Like Cape Mudge, Campbell River submitted that had Binnie J.'s earlier involvement in these matters come to light prior to the hearing he would have had no choice but to recuse himself absent the consent of all the parties. According to Campbell River, subjective evidence of a judge's state of mind, and thus Binnie J.'s absence of recollection, is legally irrelevant to a determination of whether there is a reasonable apprehension of bias. Moreover, Campbell River submitted that, owing to Binnie J.'s special interest in aboriginal matters, the unique "ditto mark error" at issue in this case and his involvement as counsel in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), common sense would indicate that some contaminating knowledge would have survived the passage of time, albeit unconsciously.

49 With respect to remedy, both bands submitted that a judgment affected by a reasonable apprehension of bias is void and must be set aside. According to Campbell River, the concurrence of the eight other judges of this Court does not remove the taint of bias. Campbell River submitted that in law a reasonable apprehension of bias taints the entire proceeding and is presumed to be transmitted among decision-makers.

50 As indicated previously, Cape Mudge submitted that this Court should also recommend that the parties enter into a negotiation and reconciliation process or, in the alternative, suspend operation of the judgment for four months so that discussions between the parties could take place. For its part, Campbell River requested an order permitting it to bring an application for further relief following a decision to set aside the judgment. During oral argument, counsel for both bands indicated that a rehearing of the appeals may ultimately become necessary should the decision be set aside and agreement between the parties prove impossible.

51 The interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band presented written arguments in support of the motions to vacate the Court's judgment. In their submission, the facts of this case give rise to a reasonable apprehension of bias and a legal finding of bias must result. Binnie J.'s lack of actual recollection is, in their view, irrelevant. The interveners go further suggesting that actual bias may have existed on Binnie J.'s part even if he neither intended it nor recalled his involvement in the case. Like Campbell River and Cape Mudge, the interveners submitted that Binnie J. would have recused himself had he recalled his participation in this case before the hearing.

B. The Crown and the Intervener the Attorney General of British Columbia

52 The Crown submitted that the Court's judgment should not be set aside and that no other remedy was required. In the Crown's view, the rule that a judge is disqualified if he or she previously acted as counsel in the case is subject to the general principle that disqualification results only where there is a reasonable apprehension of bias. Accordingly, the Crown submitted that the general test set out by de Grandpré J. in dissent in *Committee for Justice & Liberty v.*

Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369 (S.C.C.), and approved in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), should be applied to the particular circumstances of this case.

53 The Crown submitted that since Binnie J. had no recollection, he brought no knowledge of his prior participation by way of discussions about Campbell River's claim. As a result, there was neither actual bias nor any reasonable apprehension of bias on his part. Relying on the English Court of Appeal's decision in *Locabail (U.K.) v. Bayfield Properties Ltd.*, [2000] Q.B. 451 (Eng. C.A.), the Crown submitted that Binnie J.'s lack of recollection dispels any appearance of possible bias. According to the Crown, the fact that Binnie J.'s prior involvement occurred 17 years earlier reinforces the conclusion that there can be no reasonable apprehension of bias. On this point, the bands concede that the passage of time is a relevant factor. Finally, the Crown submitted that since the judgment of the Court was unanimous in dismissing the appeals, and since Binnie J. had no recollection of his earlier involvement, no reasonable person could conclude that he somehow influenced the minds of the other eight judges who heard the case.

54 The Attorney General of British Columbia also submitted that the Court's judgment should not be disturbed. He submitted that the information disclosed by the Crown would not have necessitated Binnie J.'s recusal had an application been made before the hearing. *A fortiori*, the disclosed information does not establish a reasonable apprehension of bias nor require that the judgment be set aside. The Attorney General of British Columbia further submitted that, although evidence of a judge's subjective state of mind is not determinative as to the issue of whether a reasonable apprehension of bias arises, it remains relevant and of assistance to the reasonable and right-minded observer.

55 The Attorney General of British Columbia submitted that Binnie J. did not act as counsel for the Crown in this case. His involvement was in a general administrative and supervisory capacity, which does not give rise to a reasonable apprehension of bias. It was submitted that a reasonable person would not consider that the tentative views on a general issue expressed by Binnie J. 15 years earlier, in his capacity as Associate Deputy Minister, would prevent him from deciding the case impartially.

56 The Attorney General of British Columbia further submitted that since the decision-maker was the Court as a whole, a reasonable apprehension of bias in respect of Binnie J. is not legally significant unless it also establishes a reasonable apprehension of bias in respect of the judgment of the Court as a whole. In this case, the judgment of the Court as a whole is not tainted by any apprehension of bias. Moreover, the presumption of impartiality has a practical force in respect of appellate tribunals. The fact that appellate courts normally evaluate a written record and the collegial nature of an appellate bench reduces the leeway within which the personal attributes, traits and dispositions of each judge can operate. Finally, the Attorney General submitted that if there was a disqualifying bias in respect of the Court as a whole, the remedy would be to vacate

the judgment and for the Court to reconsider the appeals in the absence of Binnie J. under the doctrine of necessity.

IV. Analysis

A. The Importance of the Principle of Impartiality

57 The motions brought by the parties require that we examine the circumstances of this case in light of the well-settled, foundational principle of impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

58 The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

> . . . a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

(*R. v. Bertram*, [1989] O.J. No. 2123 (Ont. H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), at para. 106)

59 Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: The Council, 1998), at p. 30). It is the key to our judicial process and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 394, is the reasonable apprehension of bias:

> . . . 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. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

61 We will return shortly to this standard, as it applies to the circumstances outlined in the factual background. Before doing that, it is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias; and the notion of automatic disqualification re-emerging in recent English decisions.

B. Reasonable Apprehension of Bias and Actual Bias

62 Determining whether the judge brought or would bring prejudice into consideration as a matter of fact is rarely an issue. Of course, where this can be established, it will inevitably lead to the disqualification of the judge. But this said, most arguments for disqualification typically begin with an acknowledgment by all parties that there was no actual bias and move on to a consideration of the reasonable apprehension of bias. Here, as in many cases, it is conceded by the parties that there was no actual bias on Binnie J.'s part, and his statement that he had no recollection of involvement is similarly accepted by all concerned. As submitted by the parties, his personal integrity is not in doubt, either in these appeals or in any appeal in which he has sat as a member of this Court. Nevertheless, it is said, the circumstances of the present case are such as to create a reasonable apprehension of bias on his part. Since the two propositions go hand in hand, to understand what is meant by reasonable apprehension of bias, it is helpful to consider what it means to say that disqualification is not argued on the basis of actual bias.

63 Saying that there was "no actual bias" can mean one of three things: that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it, that unconscious bias can exist, even where the judge is in good faith, or that the presence or absence of actual bias is not the relevant inquiry. We take each in turn.

64 First, when parties say that there was no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the "reasonable apprehension of bias" can be seen as a surrogate for actual bias on the assumption that it may be unwise or unrealistic to require that kind of evidence. It is obviously impossible to determine the precise state of mind of an adjudicator (Cory J. in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.), at p. 636). As stated by the English Court of Appeal in *Locabail (U.K.)*, *supra*, at p. 472:

> The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

Again, in the present instance, no one suggests that Binnie J. was consciously allowing extraneous influences to affect his mind. Consequently, it would appear that reasonable apprehension of bias is not invoked here as a surrogate for actual bias.

65 Second, when parties say that there was no actual bias on the part of the judge, they may be conceding that the judge was acting in good faith and was not consciously relying on inappropriate preconceptions, but was nevertheless unconsciously biased. In *R. v. Gough*, [1993] A.C. 646 (Eng. C.A.), at p. 665, quoting Devlin L.J. in *R. v. Justices of Barnsley*, [1960] 2 Q.B. 167 (Eng. C.A.), Lord Goff reminded us that:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.

As framed, some of the arguments presented by the parties suggest that they are preoccupied that Binnie J. may have been unconsciously biased despite his good faith.

66 Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 (Eng. K.B.), at p. 259). To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was *in fact* either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, *supra*, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice."

67 Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done - that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances. In that

sense, the oft-stated idea that "justice must be seen to be done," which was invoked by counsel for the bands, cannot be severed from the standard of reasonable apprehension of bias.

68 We emphasize this aspect of the criterion of disqualification in Canadian law because another strand of this area of the law in the Commonwealth suggests that some circumstances of conflict of interest may be enough to justify disqualification, whether or not, from the perspective of the reasonable person, they could have any impact on the judge's mind. As we conclude in the next section, this line of argument is not helpful to counsel for the bands in the present case.

C. Reasonable Apprehension of Bias and Automatic Disqualification

69 At the opposite end from claims of actual bias, it has been suggested that it is wrong to be a judge in one's own cause, whether or not one knows this to be the case. The idea has been linked to the early decision of *Dimes v. Grand Junction Canal Co.* (1852), 3 H.L.C. 759, 10 E.R. 301 (U.K. H.L.). More recently, in *Gough*, *supra*, at p. 661, Lord Goff stated that

> . . . there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand . . . . These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings . . . . In such a case, . . . not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

70 This has been described as "automatic disqualification" and was recently revisited by the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate*, [1999] 2 W.L.R. 272 (U.K. H.L.). There, the House of Lords dealt with a situation in which Lord Hoffman had participated in a decision in which Amnesty International was an intervener, while sitting as a director and chairperson of a charity closely allied with Amnesty International and sharing its objects. In that context, it was found that the rule of "automatic disqualification" extended to a limited class of non-financial interests, where the judge has such a relevant interest in the subject matter of the case that he or she is effectively in the position of a party to the cause. As a result, Lord Hoffman was disqualified, and the decision of the House of Lords was set aside, in a judgment that drew much attention around the world.

71 A more recent decision of the English Court of Appeal suggests that this extension of the rule of automatic disqualification, beyond cases of financial interests, is likely to remain exceptional (*Locabail (U.K.)*, *supra*). Even so extended, the rule of automatic disqualification does not apply to the situation in which the decision-maker was somehow involved in the litigation or linked to counsel at an earlier stage, as is argued here.

72 Whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person. In any event, even on the assumption that the line of reasoning developed in *Bow Street*, *supra*, is authoritative in Canada, it is of no relevance in the present case. On the facts before us, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.

73 To sum up, if disqualification is to be argued here, it can only be argued on the basis of a reasonable apprehension of bias. It can only succeed if it is established that reasonable, right-minded and properly informed persons would think that Binnie J. was consciously or unconsciously influenced in an inappropriate manner by his participation in this case over 15 years before he heard it here in the Supreme Court of Canada. We now move to this aspect of the matter.

D. Reasonable Apprehension of Bias and Its Application in this Case

74 The question, once more, is as follows: What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

75 Three preliminary remarks are in order.

76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

> The grounds for this apprehension must, however, be substantial, and I . . . refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

(*Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 395)

77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd v. Auckland City Council*, [2002] 3 N.Z.L.R. 577 (New Zealand P.C.), at para. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression

of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

78 Third, in circumstances such as the present one, where the issue of disqualification arises after judgment has been rendered, rather than at an earlier time in the proceedings, it is neither helpful nor necessary to determine whether the judge would have recused himself or herself if the matter had come to light earlier. There is no doubt that the standard remains the same, whenever the issue of disqualification is raised. But hypotheses about how judges react where the issue of recusal is raised early cannot be severed from the abundance of caution that guides many, if not most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this respect, it may well be that judges have recused themselves in cases where it was, strictly speaking, not legally necessary to do so. Put another way, the fact that a judge would have recused himself or herself *ex ante* cannot be taken to be determinative of a reasonable apprehension of bias *ex post*.

79 As the parties acknowledged, Binnie J.'s past status as Associate Deputy Minister is, by itself, insufficient to justify his disqualification. The same can be said of his long-standing interest in matters involving First Nations. The source of concern, for the bands in these motions to vacate the judgment, is Binnie J.'s involvement in this case, as opposed to his general duties as head of litigation for the Department of Justice in the mid-1980s.

80 In this respect, the bands relied, among other arguments, on the following statement of Laskin C.J., in *Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 388:

> Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. *A fortiori*, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example, even if they had drawn up or had a hand in the statement of claim or statement of defence and nothing else.

81 This dictum must be understood in the context of the principle of which it is but an illustration. It does not suggest that any degree of earlier participation in a case is cause for automatic disqualification. This statement provides sensible guidance for individuals to consider *ex ante*. It suggests that a reasonable and right-minded person would likely view unfavourably the fact that the judge acted as counsel in a case over which he or she is presiding and could take this fact as the foundation of a reasonable apprehension of bias.

82 However, contrary to what has been argued, it cannot realistically be held that Binnie J. acted as counsel in the present case, and the limited extent of his participation does not support a reasonable apprehension of bias. To repeat, what is germane is the nature and extent of Binnie J.'s role. The details of Binnie J.'s involvement in this case, as outlined in the earlier part of these reasons and which should be viewed in the context of his broad duties in the Department of Justice,

would convince a reasonable person that his role was of a limited supervisory and administrative nature.

83 Admittedly, Binnie J.'s link to this litigation exceeded *pro forma* management of the files. On the other hand, it should be noted that he was never counsel of record and played no active role in the dispute after the claim was filed. Memorandum No. 4, dated December 12, 1985, shows that the case was referred to the Vancouver Regional Office within a few days after filing of the Campbell River Claim. Although subsequent memoranda indicate that Binnie was kept informed of some developments in relation to this claim, carriage of the action was in the hands of Mr. Bill Scarth in Vancouver. The facts do not support the proposition that Binnie planned litigation strategy for this case, as is suggested by the bands. For example, in their submissions, the Cape Mudge Band seemed to imply that the handwritten note in the margin of Memorandum No. 3 was written by Binnie in that "[he] was part of the Crown's early tactical considerations in this case; considering which approach would create the lowest risk for the Crown; which approach would constitute the 'least damaging way to go' " (see Cape Mudge's factum, at para. 12). However, upon examination of this note it would appear that it is addressed to "Ian [Binnie]" and signed "Bob" [Green]. Furthermore, and as indicated above, Memos 8, 9 and 10, in particular, establish that any views attributed to Binnie earlier on were offered in the context of wider implications of the negotiation process, and not in the context of litigation.

84 Furthermore, in assessing the potential for bias arising from a judge's earlier activities as counsel, the reasonable person would have to take into account the characteristics of legal practice within the Department of Justice, as compared to private practice in a law firm. See the Canadian Judicial Council's *Ethical Principles for Judges*, *supra*, at p. 47. In this respect, it bears repeating that all parties accepted that a reasonable apprehension of bias could not rest simply on Binnie J.'s years of service in the Department of Justice. In his capacity as Associate Deputy Minister, Binnie had responsibility for thousands of files at the relevant time. While his views were sought in the negotiations stage of the present dispute, it is relevant that he was consulted on strategic orientations in dozens of cases or classes of cases. In this regard, the matter on which he was involved in this file, principally the effect of the McKenna McBride Report, was not an issue unique to this case, but was an issue of general application to existing reserves in British Columbia. This was presumably the reason why he was approached in the first place.

85 To us, one significant factor stands out and must inform the perspective of the reasonable person assessing the impact of this involvement on Binnie J.'s impartiality in the appeals. That factor is the passage of time. Most arguments for disqualification rest on circumstances that are either contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making.

86 In *Locabail (U.K.)*, *supra*, at p. 480, the English Court of Appeal stated:

> . . . every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

87 Similarly, in *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33 (England P.C.), at para. 16, the Privy Council said:

> Another consideration which weighs against any idea of apparent or potential bias in the present case is the length of time which intervened between Rattray P.'s conduct in connection with the Act or indeed his holding of the office of Attorney General and the time when he sat as President in the Court of Appeal to hear the present case . . . . It appears that Rattray P. retired as Attorney General in 1993. The hearing of the appeal was in 1998. While that interval of time is not so great as to make the former connection with the Act one of remote history, it is nevertheless of some significance in diminishing to some degree the strength of any objection which could be made to his qualification to hear the case.

88 In the present instance, Binnie J.'s limited supervisory role in relation to this case dates back over 15 years. This lengthy period is obviously significant in relation to Binnie J.'s statement that when the appeals were heard and decided, he had no recollection of his involvement in this file from the 1980s. The lack of knowledge or recollection of the relevant facts was addressed by the English Court of Appeal in *Locabail (U.K.)*, *supra*. There, at p. 487, the Court of Appeal asked

> How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest?

89 The parties have not challenged Binnie J.'s statement, and we are of the view that they are not required to do so. The question is whether the reasonable person's assessment is affected by his statement, in light of the context - that is, in light of the amount of time that has passed, coupled with the limited administrative and supervisory role Binnie played in this file. In our view, it is a factor that the reasonable person would properly consider, and it makes bias or its apprehension improbable in the circumstances.

90 Binnie J.'s lack of recollection is thus relevant. Yet it is not decisive of the issue. This is not a case in which the judge never knew about the relevant conflict of interest, which would be much easier, but a case in which the judge no longer recalls it. Without questioning his recollection, the argument can be made that his earlier involvement in the file affected his perspective unconsciously. Nevertheless, we are convinced that the reasonable person, viewing the matter realistically, would not come to the conclusion that the limited administrative and supervisory role played by Binnie J. in this file, over 15 years ago, affected his ability, even

unconsciously, to remain impartial in these appeals. This is true, quite apart from the multitude of events and experiences that have shaped him as a lawyer and judge in the interim and the significant transformations of the law as it relates to aboriginal issues, that we have all witnessed since 1985.

91 We thus conclude that no reasonable apprehension of bias is established and that Binnie J. was not disqualified in these appeals. The judgment of the Court and the reasons delivered by Binnie J. on December 6, 2002, must stand. It is unnecessary to examine the question whether, in the event that the Court had found that Binnie J. was disqualified, the judgment of the Court in these appeals would have been undermined. Nevertheless, because of the importance of the issue, we offer a few comments in this respect.

92 The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. Many Justices of the Court have spoken publicly on this matter, and a rather complete description of it can be found in an essay published in 1986 by Justice Bertha Wilson ("Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227). For present purposes, it is enough to say the following. Each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to "brief" the rest of the coram before the hearing. After the case is heard, each judge on the coram expresses his or her opinion independently. Discussions take place on who will prepare draft reasons and whether for the majority or the minority. Draft reasons are then prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all.

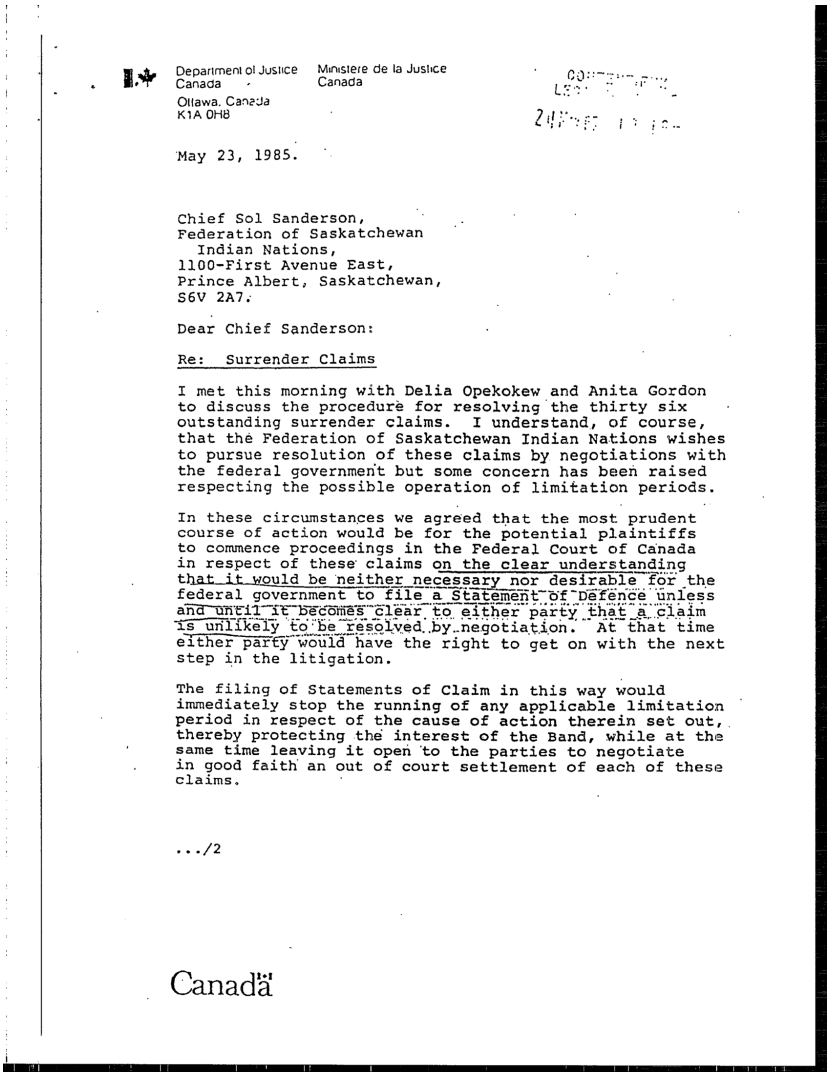
93 Here, the nine judges who sat on these appeals shared the same view as to the disposition of the appeals and the reasons for judgment. Cases where the tainted judge casts the deciding vote in a split decision are inapposite in this respect. In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.

V. Conclusion

94 We conclude that no reasonable apprehension of bias is established. Binnie J. was not disqualified to hear these appeals and to participate in the judgment. As a result, the motions to vacate the judgment rendered by this Court on December 6, 2002, are dismissed. The Crown's motion for directions is also dismissed. Although the bands requested costs, the Crown did not. Under the circumstances, each party will bear its own costs.

Motion dismissed.

Appendix — Appendix



Department of Justice Canada
Ottawa, Canada
K1A 0H8

Ministère de la Justice Canada

May 23, 1985.

Chief Sol Sanderson,
Federation of Saskatchewan
Indian Nations,
1100-First Avenue East,
Prince Albert, Saskatchewan,
S6V 2A7.

Dear Chief Sanderson:

Re: Surrender Claims

I met this morning with Delia Opekokew and Anita Gordon to discuss the procedure for resolving the thirty six outstanding surrender claims. I understand, of course, that the Federation of Saskatchewan Indian Nations wishes to pursue resolution of these claims by negotiations with the federal government but some concern has been raised respecting the possible operation of limitation periods.

In these circumstances we agreed that the most prudent course of action would be for the potential plaintiffs to commence proceedings in the Federal Court of Canada in respect of these claims on the clear understanding that it would be neither necessary nor desirable for the federal government to file a Statement of Defence unless and until it becomes clear to either party that a claim is unlikely to be resolved by negotiation. At that time either party would have the right to get on with the next step in the litigation.

The filing of Statements of Claim in this way would immediately stop the running of any applicable limitation period in respect of the cause of action therein set out, thereby protecting the interest of the Band, while at the same time leaving it open to the parties to negotiate in good faith an out of court settlement of each of these claims.

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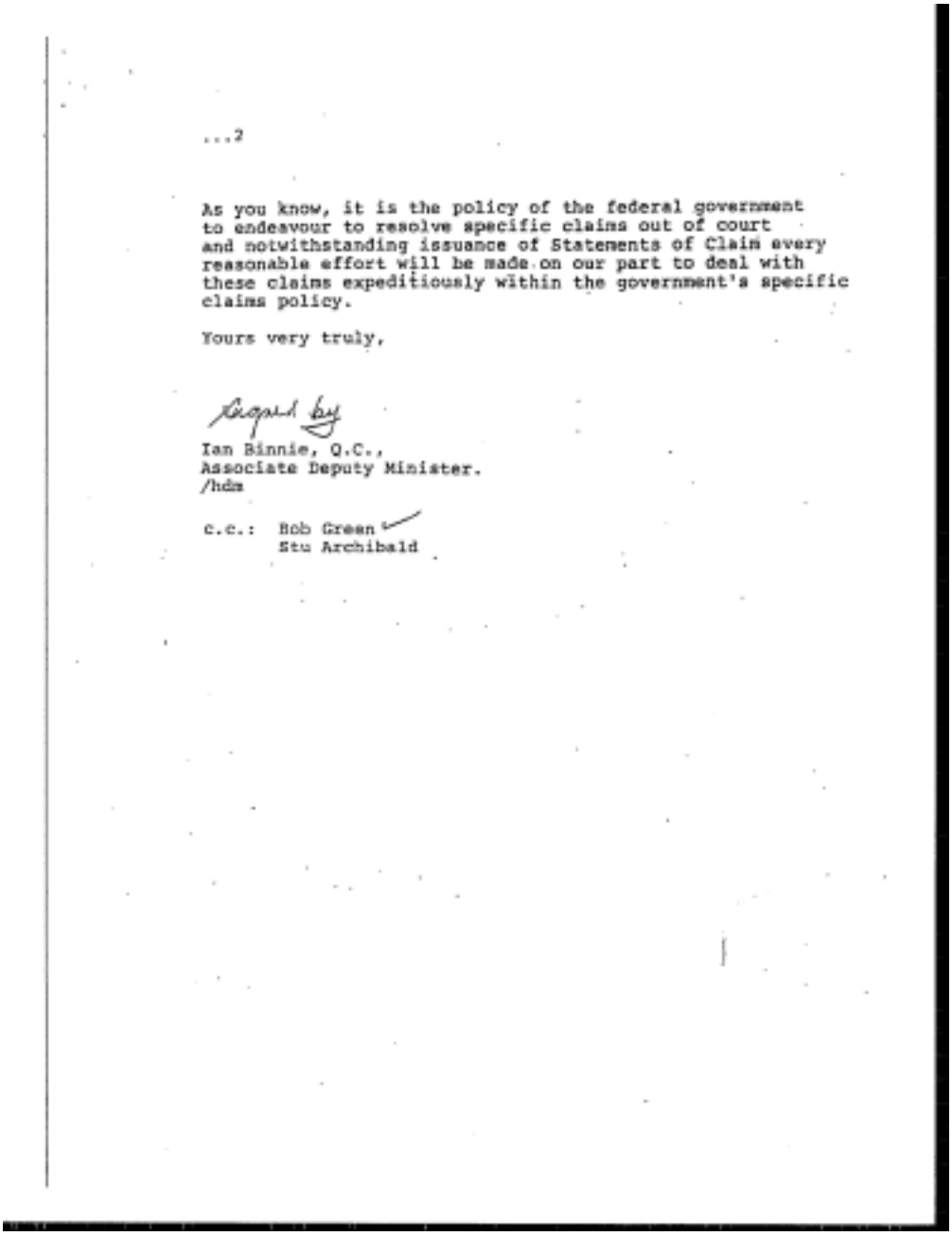

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As you know, it is the policy of the federal government to endeavour to resolve specific claims out of court and notwithstanding issuance of Statements of Claim every reasonable effort will be made on our part to deal with these claims expeditiously within the government's specific claims policy.

Yours very truly,

Signed by

Ian Binnie, Q.C.,
Associate Deputy Minister.
/hdm

c.c.: Bob Green
Stu Archibald

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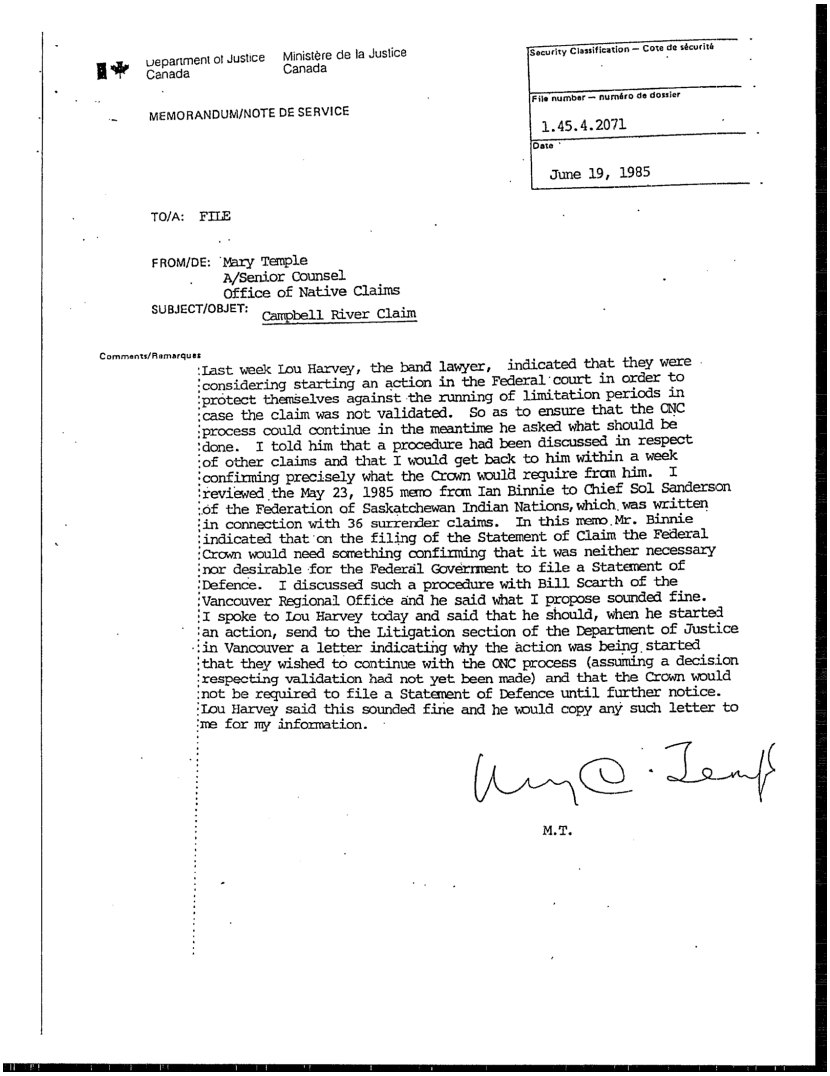

Department of Justice Canada / Ministère de la Justice Canada

Security Classification — Cote de sécurité

File number — numéro de dossier: 1.45.4.2071

Date: June 19, 1985

MEMORANDUM/NOTE DE SERVICE

TO/A: FILE

FROM/DE: Mary Temple
A/Senior Counsel
Office of Native Claims

SUBJECT/OBJET: Campbell River Claim

Comments/Remarques

Last week Lou Harvey, the band lawyer, indicated that they were considering starting an action in the Federal court in order to protect themselves against the running of limitation periods in case the claim was not validated. So as to ensure that the ONC process could continue in the meantime he asked what should be done. I told him that a procedure had been discussed in respect of other claims and that I would get back to him within a week confirming precisely what the Crown would require from him. I reviewed the May 23, 1985 memo from Ian Binnie to Chief Sol Sanderson of the Federation of Saskatchewan Indian Nations, which was written in connection with 36 surrender claims. In this memo Mr. Binnie indicated that on the filing of the Statement of Claim the Federal Crown would need something confirming that it was neither necessary nor desirable for the Federal Government to file a Statement of Defence. I discussed such a procedure with Bill Scarth of the Vancouver Regional Office and he said what I propose sounded fine. I spoke to Lou Harvey today and said that he should, when he started an action, send to the Litigation section of the Department of Justice in Vancouver a letter indicating why the action was being started that they wished to continue with the ONC process (assuming a decision respecting validation had not yet been made) and that the Crown would not be required to file a Statement of Defence until further notice. Lou Harvey said this sounded fine and he would copy any such letter to me for my information.

M.T.

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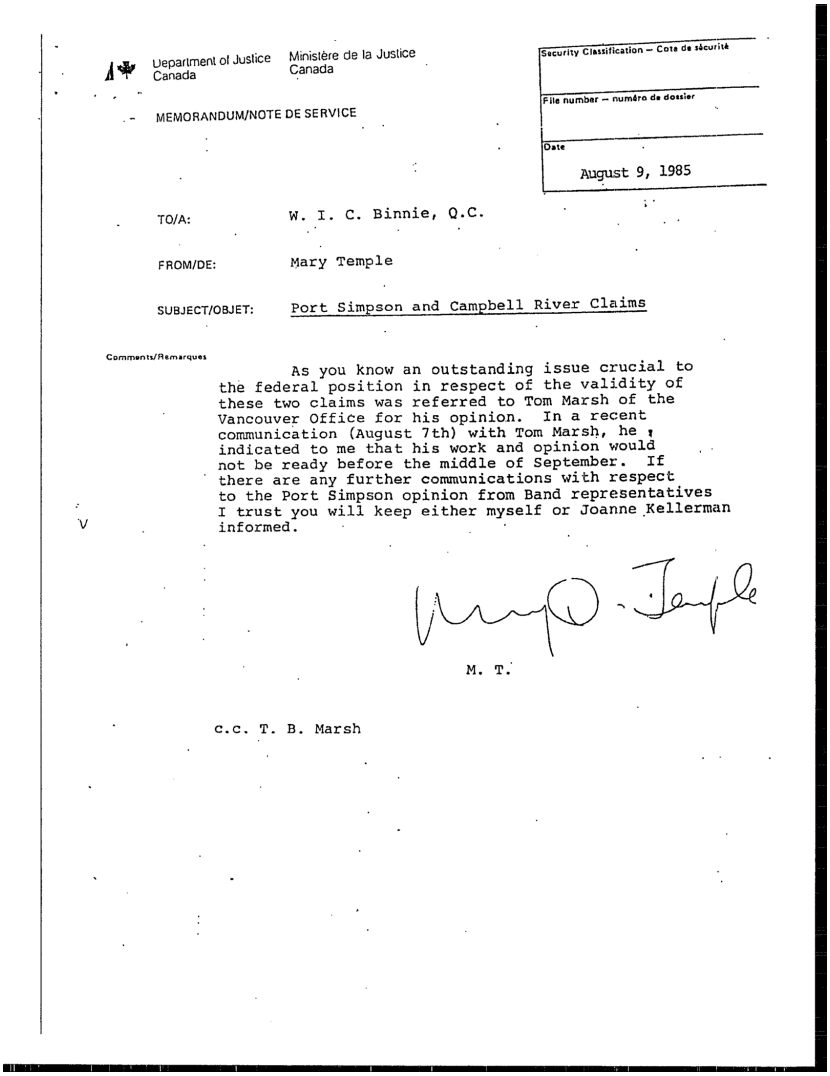

Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité

File number – numéro de dossier

Date: August 9, 1985

TO/A: W. I. C. Binnie, Q.C.

FROM/DE: Mary Temple

SUBJECT/OBJET: Port Simpson and Campbell River Claims

Comments/Remarques

As you know an outstanding issue crucial to the federal position in respect of the validity of these two claims was referred to Tom Marsh of the Vancouver Office for his opinion. In a recent communication (August 7th) with Tom Marsh, he indicated to me that his work and opinion would not be ready before the middle of September. If there are any further communications with respect to the Port Simpson opinion from Band representatives I trust you will keep either myself or Joanne Kellerman informed.

Mary Temple

M. T.

c.c. T. B. Marsh

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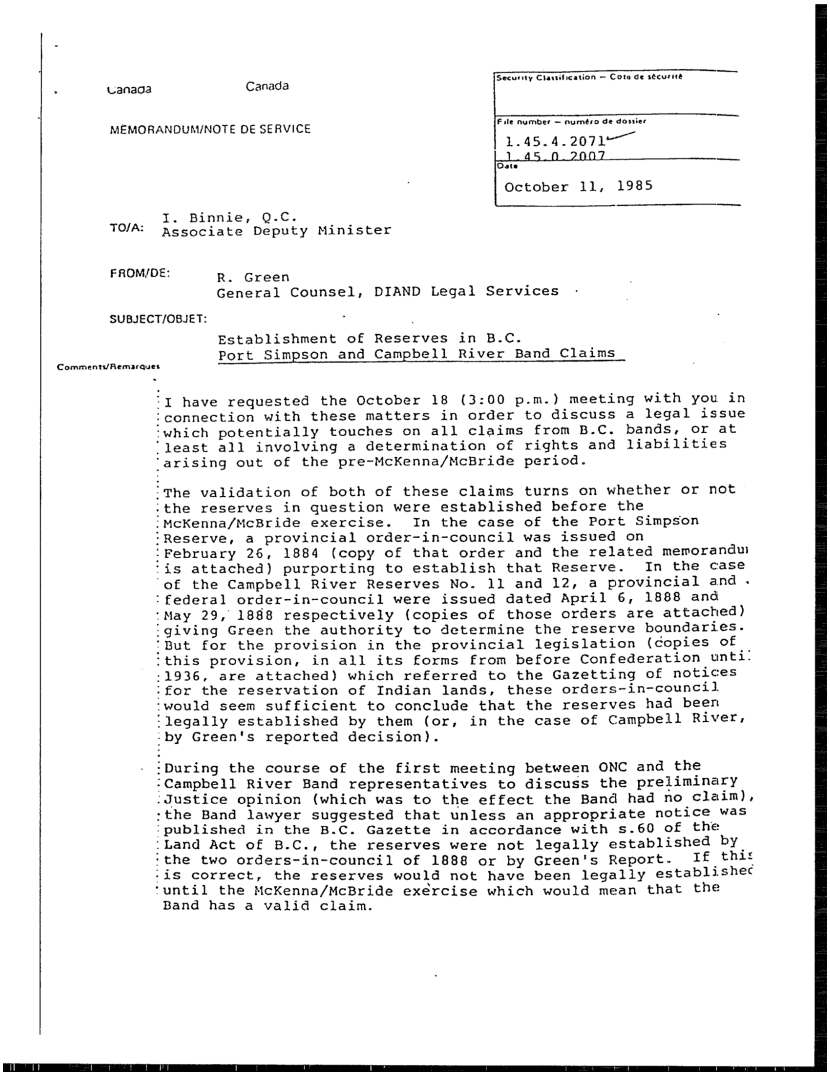

Canada Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité

File number – numéro de dossier
1.45.4.2071
1.45.0.2007

Date
October 11, 1985

TO/A: I. Binnie, Q.C.
Associate Deputy Minister

FROM/DE: R. Green
General Counsel, DIAND Legal Services

SUBJECT/OBJET:
Establishment of Reserves in B.C.
Port Simpson and Campbell River Band Claims

Comments/Remarques

I have requested the October 18 (3:00 p.m.) meeting with you in connection with these matters in order to discuss a legal issue which potentially touches on all claims from B.C. bands, or at least all involving a determination of rights and liabilities arising out of the pre-McKenna/McBride period.

The validation of both of these claims turns on whether or not the reserves in question were established before the McKenna/McBride exercise. In the case of the Port Simpson Reserve, a provincial order-in-council was issued on February 26, 1884 (copy of that order and the related memorandu is attached) purporting to establish that Reserve. In the case of the Campbell River Reserves No. 11 and 12, a provincial and federal order-in-council were issued dated April 6, 1888 and May 29, 1888 respectively (copies of those orders are attached) giving Green the authority to determine the reserve boundaries. But for the provision in the provincial legislation (copies of this provision, in all its forms from before Confederation unti 1936, are attached) which referred to the Gazetting of notices for the reservation of Indian lands, these orders-in-council would seem sufficient to conclude that the reserves had been legally established by them (or, in the case of Campbell River, by Green's reported decision).

During the course of the first meeting between ONC and the Campbell River Band representatives to discuss the preliminary Justice opinion (which was to the effect the Band had no claim), the Band lawyer suggested that unless an appropriate notice was published in the B.C. Gazette in accordance with s.60 of the Land Act of B.C., the reserves were not legally established by the two orders-in-council of 1888 or by Green's Report. If this is correct, the reserves would not have been legally established until the McKenna/McBride exercise which would mean that the Band has a valid claim.

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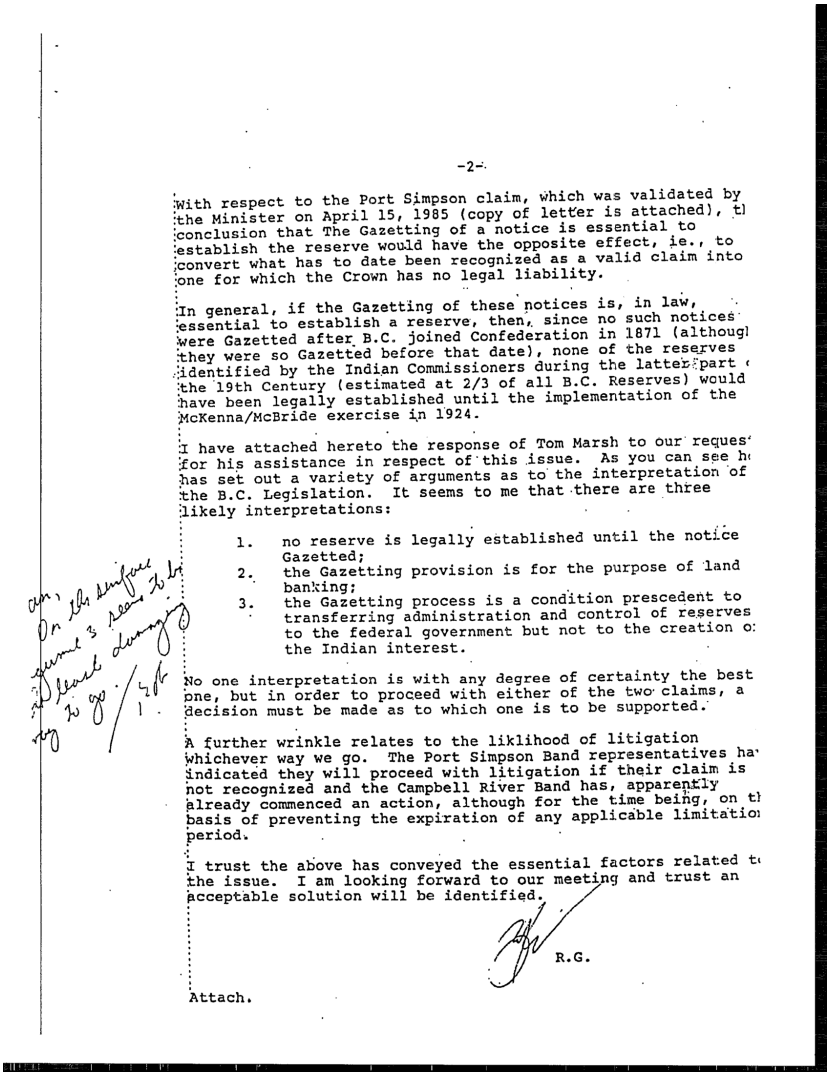

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With respect to the Port Simpson claim, which was validated by the Minister on April 15, 1985 (copy of letter is attached), tl conclusion that The Gazetting of a notice is essential to establish the reserve would have the opposite effect, ie., to convert what has to date been recognized as a valid claim into one for which the Crown has no legal liability.

In general, if the Gazetting of these notices is, in law, essential to establish a reserve, then, since no such notices were Gazetted after B.C. joined Confederation in 1871 (althoug they were so Gazetted before that date), none of the reserves identified by the Indian Commissioners during the latter part the 19th Century (estimated at 2/3 of all B.C. Reserves) would have been legally established until the implementation of the McKenna/McBride exercise in 1924.

I have attached hereto the response of Tom Marsh to our reques for his assistance in respect of this issue. As you can see h has set out a variety of arguments as to the interpretation of the B.C. Legislation. It seems to me that there are three likely interpretations:

1. no reserve is legally established until the notice Gazetted;
2. the Gazetting provision is for the purpose of land banking;
3. the Gazetting process is a condition prescedent to transferring administration and control of reserves to the federal government but not to the creation o the Indian interest.

No one interpretation is with any degree of certainty the best one, but in order to proceed with either of the two claims, a decision must be made as to which one is to be supported.

A further wrinkle relates to the liklihood of litigation whichever way we go. The Port Simpson Band representatives ha indicated they will proceed with litigation if their claim is not recognized and the Campbell River Band has, apparently already commenced an action, although for the time being, on t basis of preventing the expiration of any applicable limitatio period.

I trust the above has conveyed the essential factors related t the issue. I am looking forward to our meeting and trust an acceptable solution will be identified.

R.G.

Attach.

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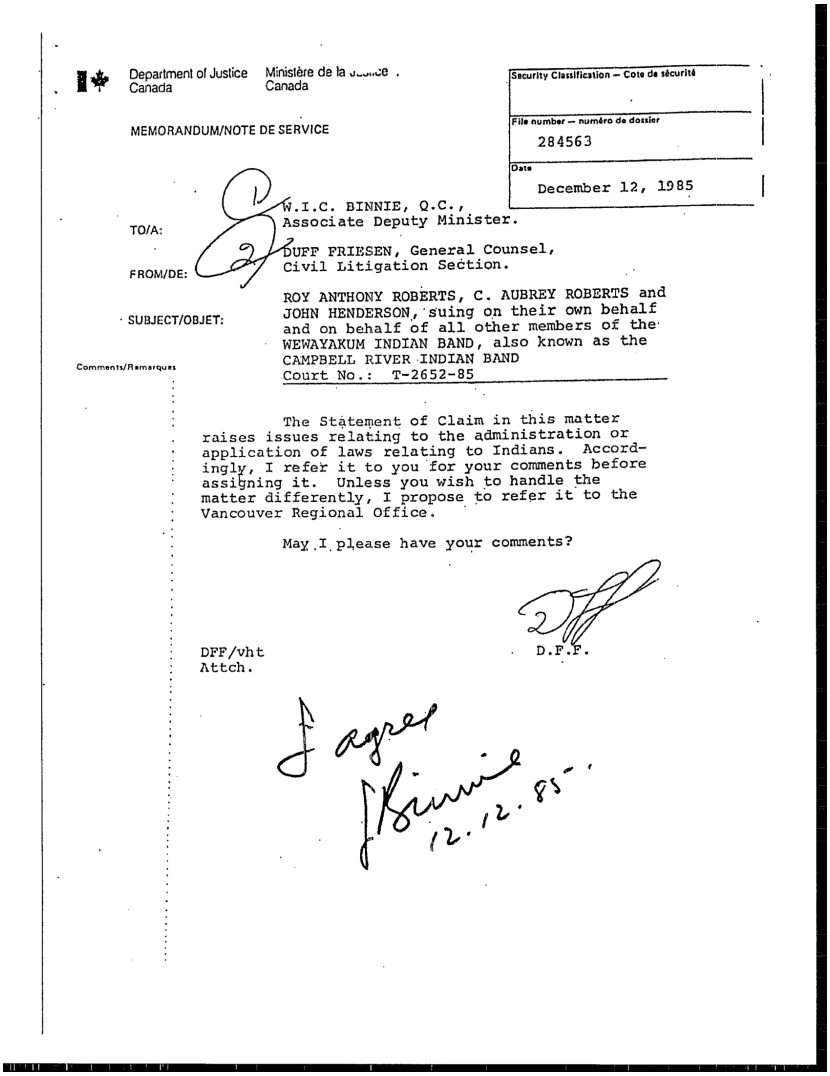

Department of Justice Canada / Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier: 284563

Date: December 12, 1985

MEMORANDUM/NOTE DE SERVICE

TO/A: W.I.C. BINNIE, Q.C., Associate Deputy Minister.

FROM/DE: DUFF FRIESEN, General Counsel, Civil Litigation Section.

SUBJECT/OBJET: ROY ANTHONY ROBERTS, C. AUBREY ROBERTS and JOHN HENDERSON, suing on their own behalf and on behalf of all other members of the WEWAYAKUM INDIAN BAND, also known as the CAMPBELL RIVER INDIAN BAND
Court No.: T-2652-85

Comments/Remarques

The Statement of Claim in this matter raises issues relating to the administration or application of laws relating to Indians. Accordingly, I refer it to you for your comments before assigning it. Unless you wish to handle the matter differently, I propose to refer it to the Vancouver Regional Office.

May I please have your comments?

D.F.F.

DFF/vht
Attch.

I agree
J. Binnie
12.12.85

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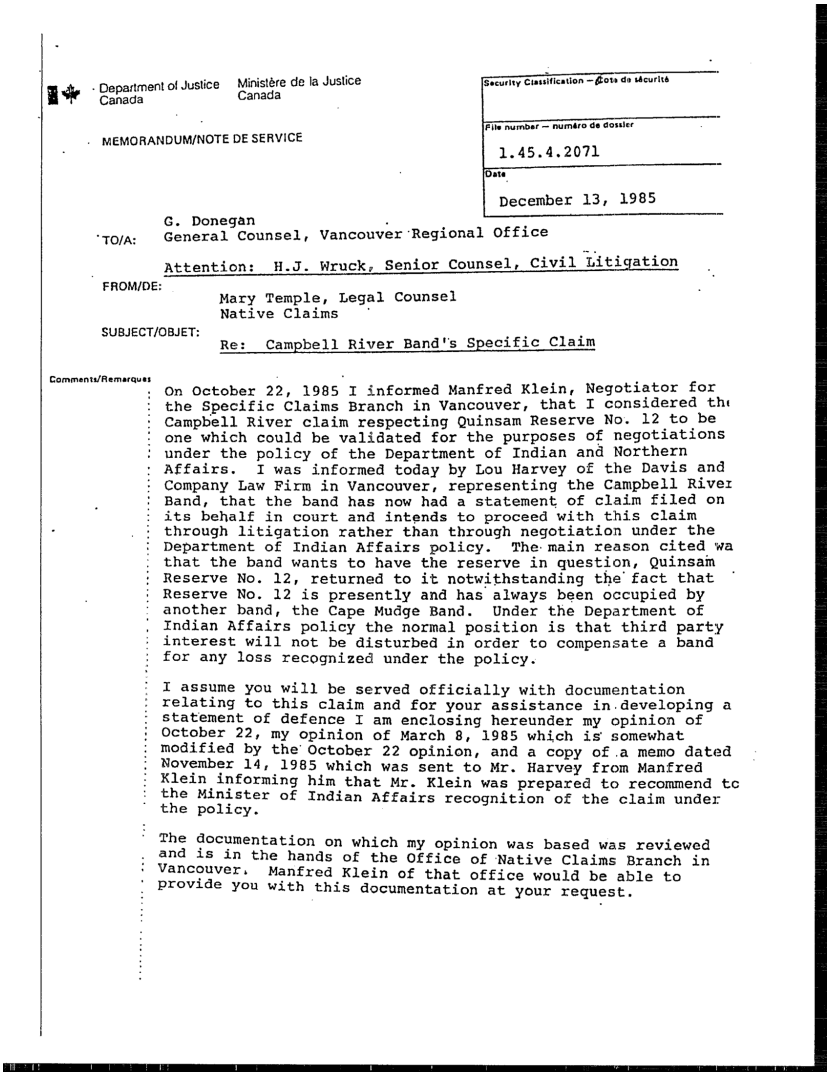

Department of Justice Canada / Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier: 1.45.4.2071

Date: December 13, 1985

MEMORANDUM/NOTE DE SERVICE

TO/A: G. Donegan
General Counsel, Vancouver Regional Office

Attention: H.J. Wruck, Senior Counsel, Civil Litigation

FROM/DE: Mary Temple, Legal Counsel
Native Claims

SUBJECT/OBJET: Re: Campbell River Band's Specific Claim

Comments/Remarques:

On October 22, 1985 I informed Manfred Klein, Negotiator for the Specific Claims Branch in Vancouver, that I considered th Campbell River claim respecting Quinsam Reserve No. 12 to be one which could be validated for the purposes of negotiations under the policy of the Department of Indian and Northern Affairs. I was informed today by Lou Harvey of the Davis and Company Law Firm in Vancouver, representing the Campbell River Band, that the band has now had a statement of claim filed on its behalf in court and intends to proceed with this claim through litigation rather than through negotiation under the Department of Indian Affairs policy. The main reason cited wa that the band wants to have the reserve in question, Quinsam Reserve No. 12, returned to it notwithstanding the fact that Reserve No. 12 is presently and has always been occupied by another band, the Cape Mudge Band. Under the Department of Indian Affairs policy the normal position is that third party interest will not be disturbed in order to compensate a band for any loss recognized under the policy.

I assume you will be served officially with documentation relating to this claim and for your assistance in developing a statement of defence I am enclosing hereunder my opinion of October 22, my opinion of March 8, 1985 which is somewhat modified by the October 22 opinion, and a copy of a memo dated November 14, 1985 which was sent to Mr. Harvey from Manfred Klein informing him that Mr. Klein was prepared to recommend to the Minister of Indian Affairs recognition of the claim under the policy.

The documentation on which my opinion was based was reviewed and is in the hands of the Office of Native Claims Branch in Vancouver. Manfred Klein of that office would be able to provide you with this documentation at your request.

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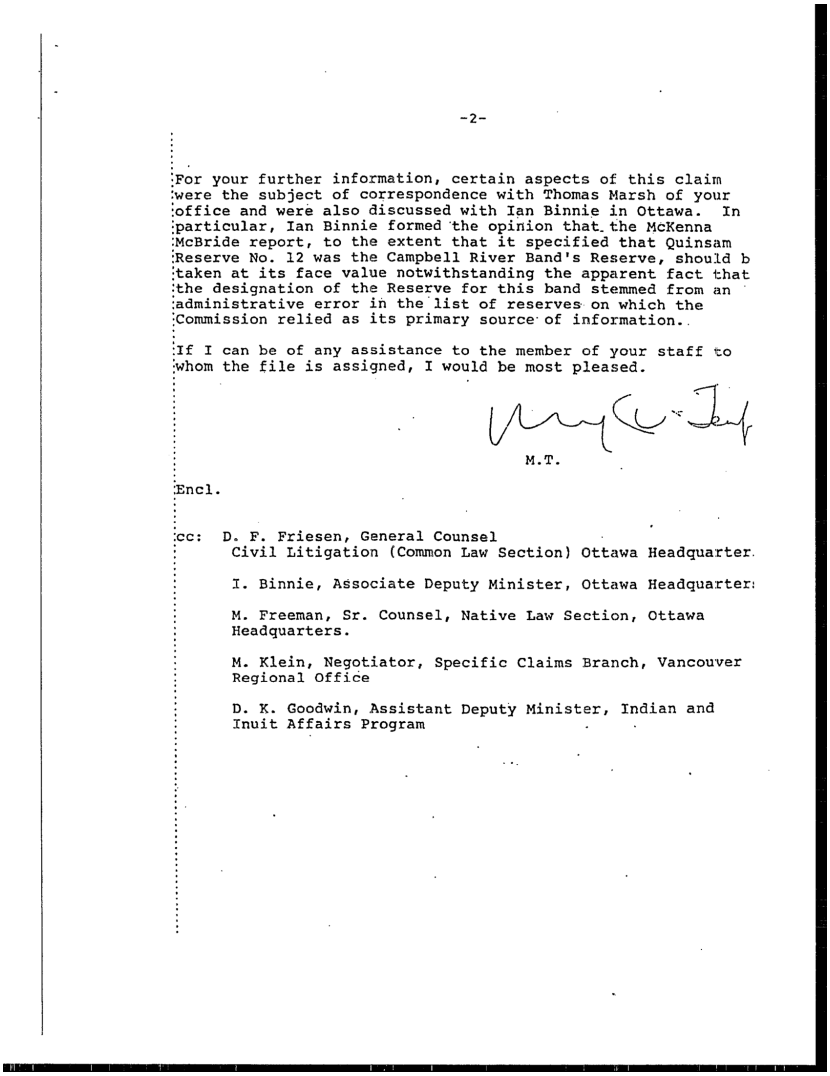

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For your further information, certain aspects of this claim were the subject of correspondence with Thomas Marsh of your office and were also discussed with Ian Binnie in Ottawa. In particular, Ian Binnie formed the opinion that the McKenna McBride report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's Reserve, should b taken at its face value notwithstanding the apparent fact that the designation of the Reserve for this band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information.

If I can be of any assistance to the member of your staff to whom the file is assigned, I would be most pleased.

M.T.

Encl.

cc: D. F. Friesen, General Counsel
Civil Litigation (Common Law Section) Ottawa Headquarter

I. Binnie, Associate Deputy Minister, Ottawa Headquarter

M. Freeman, Sr. Counsel, Native Law Section, Ottawa Headquarters.

M. Klein, Negotiator, Specific Claims Branch, Vancouver Regional Office

D. K. Goodwin, Assistant Deputy Minister, Indian and Inuit Affairs Program

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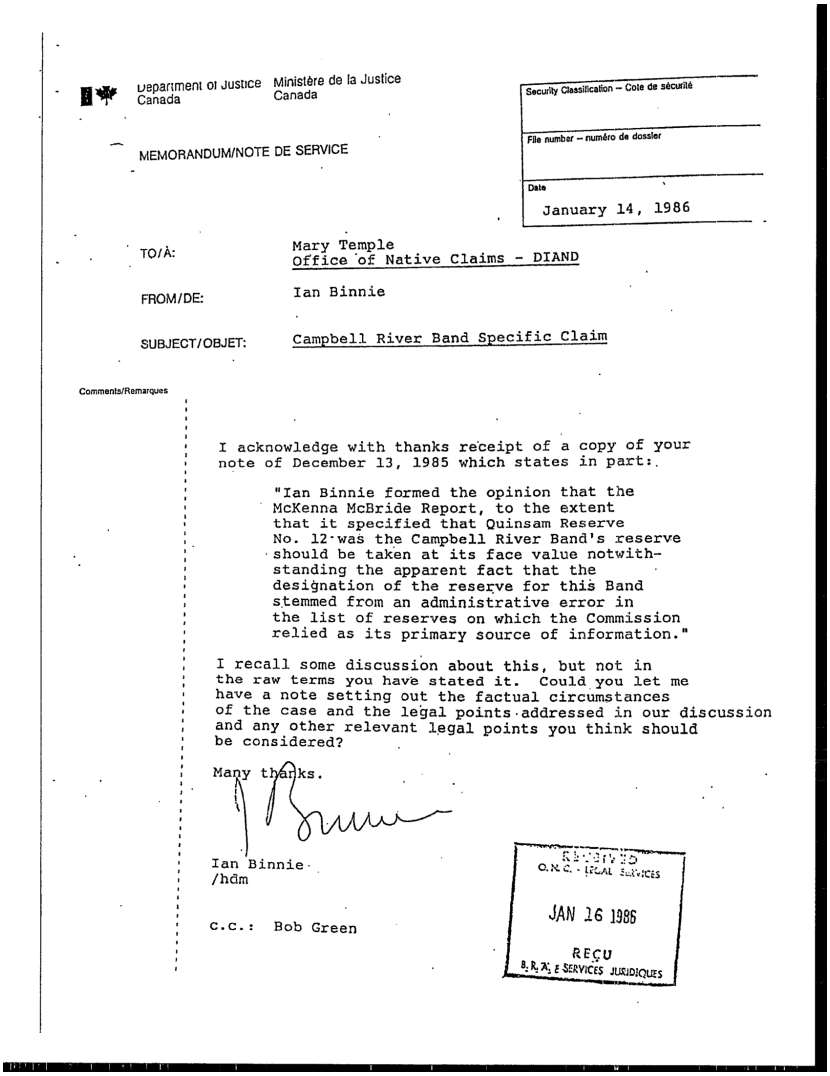

Department of Justice Canada / Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier

Date: January 14, 1986

MEMORANDUM/NOTE DE SERVICE

TO/À: Mary Temple
Office of Native Claims - DIAND

FROM/DE: Ian Binnie

SUBJECT/OBJET: Campbell River Band Specific Claim

Comments/Remarques

I acknowledge with thanks receipt of a copy of your note of December 13, 1985 which states in part:

> "Ian Binnie formed the opinion that the McKenna McBride Report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's reserve should be taken at its face value notwithstanding the apparent fact that the designation of the reserve for this Band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information."

I recall some discussion about this, but not in the raw terms you have stated it. Could you let me have a note setting out the factual circumstances of the case and the legal points addressed in our discussion and any other relevant legal points you think should be considered?

Many thanks.

Ian Binnie
/hdm

c.c.: Bob Green

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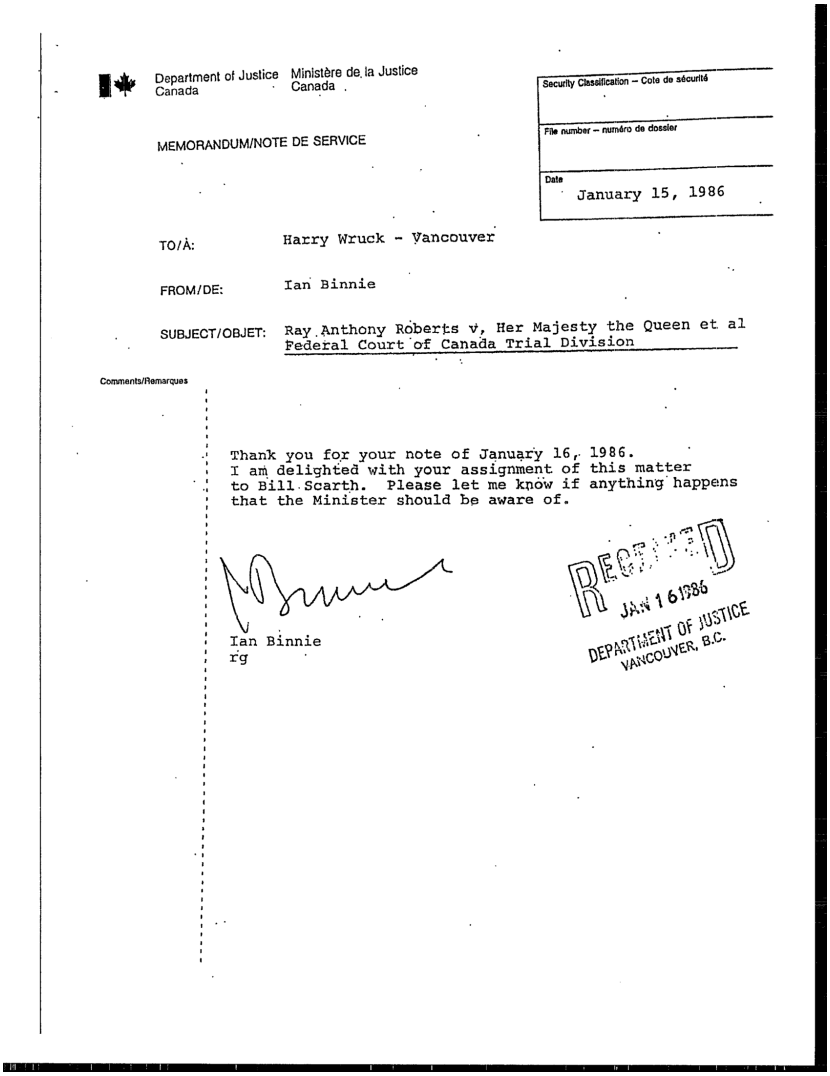

Department of Justice Canada / Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier

Date: January 15, 1986

MEMORANDUM/NOTE DE SERVICE

TO/À: Harry Wruck - Vancouver

FROM/DE: Ian Binnie

SUBJECT/OBJET: Ray Anthony Roberts v, Her Majesty the Queen et al
Federal Court of Canada Trial Division

Comments/Remarques

Thank you for your note of January 16, 1986.
I am delighted with your assignment of this matter
to Bill Scarth. Please let me know if anything happens
that the Minister should be aware of.

Ian Binnie
rg

RECEIVED
JAN 16 1986
DEPARTMENT OF JUSTICE
VANCOUVER, B.C.

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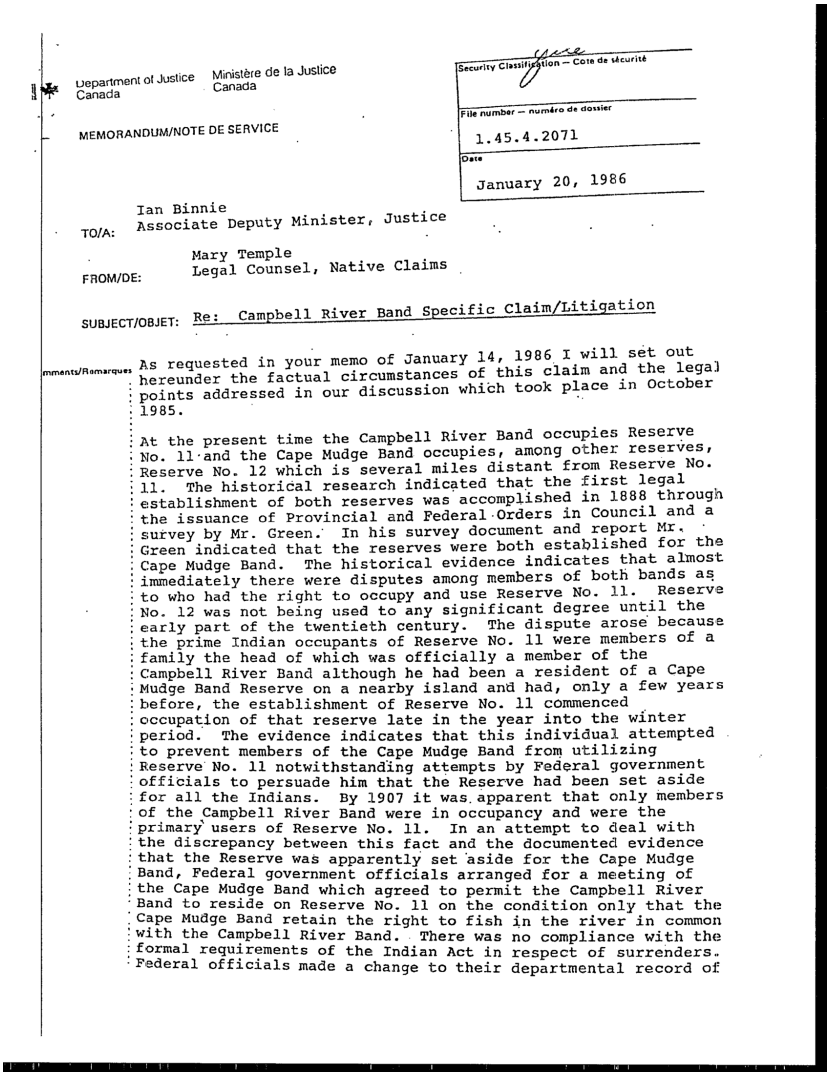

Department of Justice Canada / Ministère de la Justice Canada

Security Classification — Cote de sécurité

File number — numéro de dossier: 1.45.4.2071

Date: January 20, 1986

MEMORANDUM/NOTE DE SERVICE

TO/A: Ian Binnie
Associate Deputy Minister, Justice

FROM/DE: Mary Temple
Legal Counsel, Native Claims

SUBJECT/OBJET: Re: Campbell River Band Specific Claim/Litigation

Comments/Remarques:

As requested in your memo of January 14, 1986 I will set out hereunder the factual circumstances of this claim and the legal points addressed in our discussion which took place in October 1985.

At the present time the Campbell River Band occupies Reserve No. 11 and the Cape Mudge Band occupies, among other reserves, Reserve No. 12 which is several miles distant from Reserve No. 11. The historical research indicated that the first legal establishment of both reserves was accomplished in 1888 through the issuance of Provincial and Federal Orders in Council and a survey by Mr. Green. In his survey document and report Mr. Green indicated that the reserves were both established for the Cape Mudge Band. The historical evidence indicates that almost immediately there were disputes among members of both bands as to who had the right to occupy and use Reserve No. 11. Reserve No. 12 was not being used to any significant degree until the early part of the twentieth century. The dispute arose because the prime Indian occupants of Reserve No. 11 were members of a family the head of which was officially a member of the Campbell River Band although he had been a resident of a Cape Mudge Band Reserve on a nearby island and had, only a few years before, the establishment of Reserve No. 11 commenced occupation of that reserve late in the year into the winter period. The evidence indicates that this individual attempted to prevent members of the Cape Mudge Band from utilizing Reserve No. 11 notwithstanding attempts by Federal government officials to persuade him that the Reserve had been set aside for all the Indians. By 1907 it was apparent that only members of the Campbell River Band were in occupancy and were the primary users of Reserve No. 11. In an attempt to deal with the discrepancy between this fact and the documented evidence that the Reserve was apparently set aside for the Cape Mudge Band, Federal government officials arranged for a meeting of the Cape Mudge Band which agreed to permit the Campbell River Band to reside on Reserve No. 11 on the condition only that the Cape Mudge Band retain the right to fish in the river in common with the Campbell River Band. There was no compliance with the formal requirements of the Indian Act in respect of surrenders. Federal officials made a change to their departmental record of

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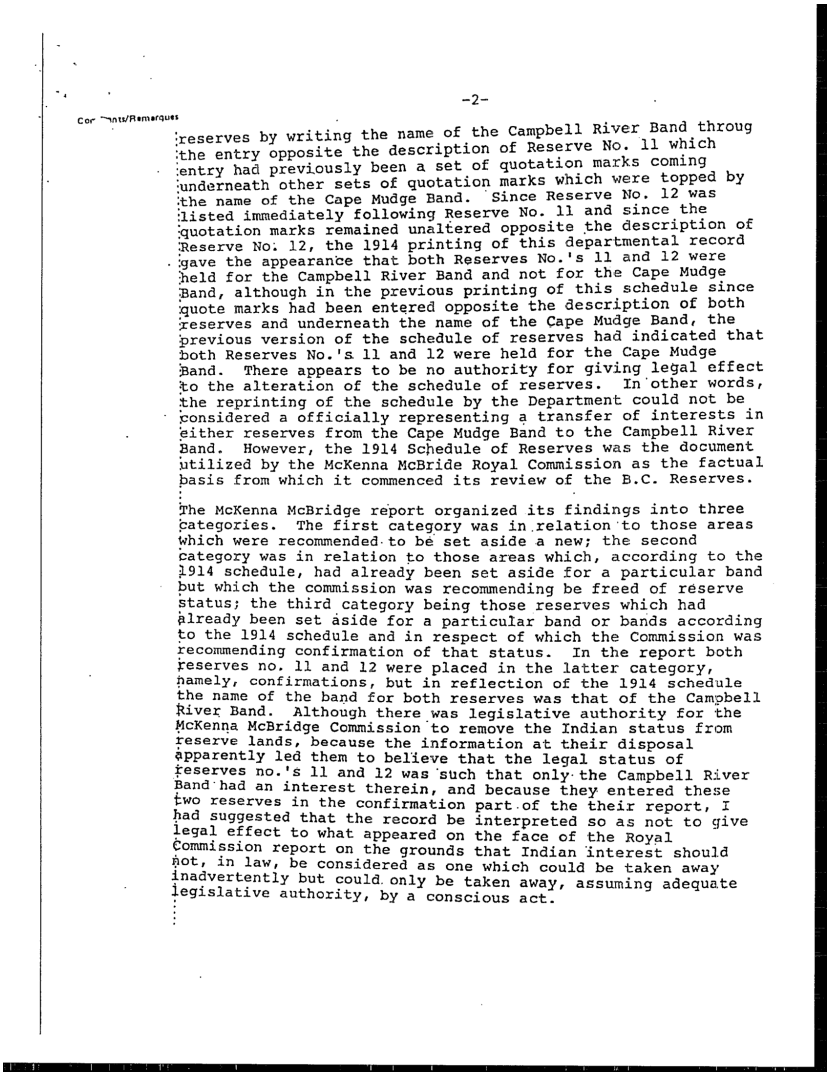

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Cor nts/Remarques

reserves by writing the name of the Campbell River Band throug the entry opposite the description of Reserve No. 11 which entry had previously been a set of quotation marks coming underneath other sets of quotation marks which were topped by the name of the Cape Mudge Band. Since Reserve No. 12 was listed immediately following Reserve No. 11 and since the quotation marks remained unaltered opposite the description of Reserve No. 12, the 1914 printing of this departmental record gave the appearance that both Reserves No.'s 11 and 12 were held for the Campbell River Band and not for the Cape Mudge Band, although in the previous printing of this schedule since quote marks had been entered opposite the description of both reserves and underneath the name of the Cape Mudge Band, the previous version of the schedule of reserves had indicated that both Reserves No.'s 11 and 12 were held for the Cape Mudge Band. There appears to be no authority for giving legal effect to the alteration of the schedule of reserves. In other words, the reprinting of the schedule by the Department could not be considered a officially representing a transfer of interests in either reserves from the Cape Mudge Band to the Campbell River Band. However, the 1914 Schedule of Reserves was the document utilized by the McKenna McBride Royal Commission as the factual basis from which it commenced its review of the B.C. Reserves.

The McKenna McBridge report organized its findings into three categories. The first category was in relation to those areas which were recommended to be set aside a new; the second category was in relation to those areas which, according to the 1914 schedule, had already been set aside for a particular band but which the commission was recommending be freed of reserve status; the third category being those reserves which had already been set aside for a particular band or bands according to the 1914 schedule and in respect of which the Commission was recommending confirmation of that status. In the report both reserves no. 11 and 12 were placed in the latter category, namely, confirmations, but in reflection of the 1914 schedule the name of the band for both reserves was that of the Campbell River Band. Although there was legislative authority for the McKenna McBridge Commission to remove the Indian status from reserve lands, because the information at their disposal apparently led them to believe that the legal status of reserves no.'s 11 and 12 was such that only the Campbell River Band had an interest therein, and because they entered these two reserves in the confirmation part of the their report, I had suggested that the record be interpreted so as not to give legal effect to what appeared on the face of the Royal Commission report on the grounds that Indian interest should not, in law, be considered as one which could be taken away inadvertently but could only be taken away, assuming adequate legislative authority, by a conscious act.

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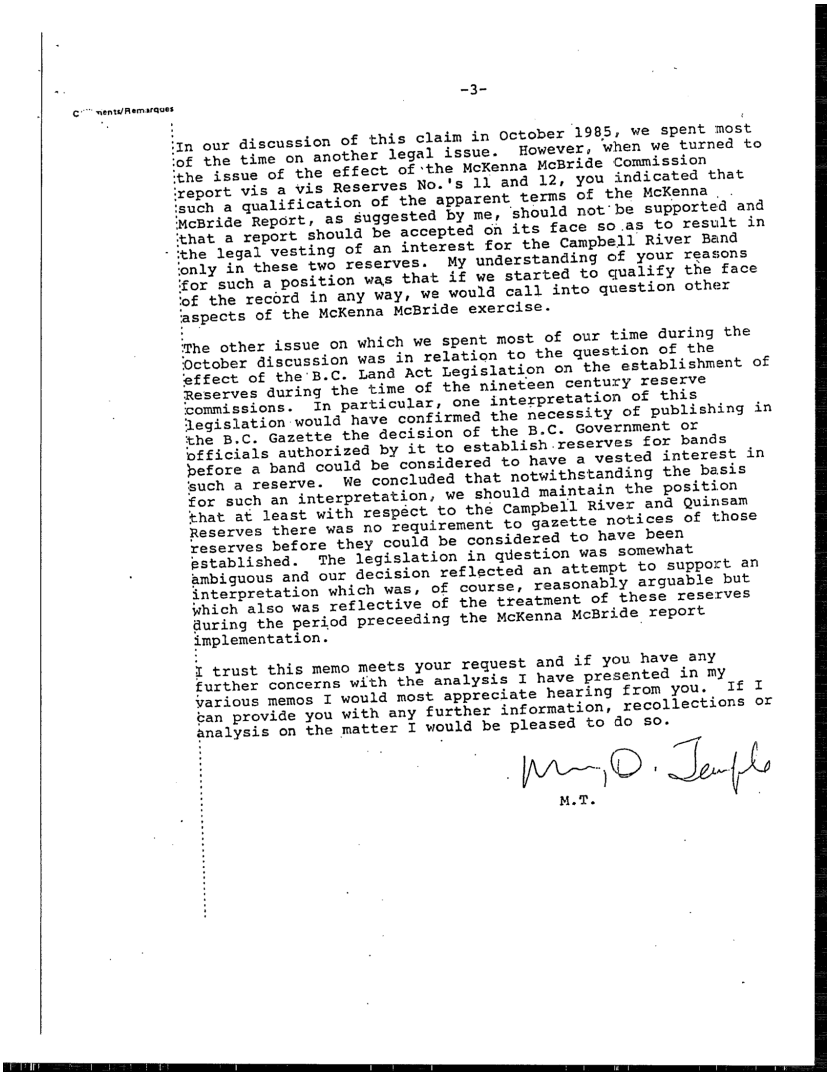

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C...ments/Remarques

In our discussion of this claim in October 1985, we spent most of the time on another legal issue. However, when we turned to the issue of the effect of the McKenna McBride Commission report vis a vis Reserves No.'s 11 and 12, you indicated that such a qualification of the apparent terms of the McKenna McBride Report, as suggested by me, should not be supported and that a report should be accepted on its face so as to result in the legal vesting of an interest for the Campbell River Band only in these two reserves. My understanding of your reasons for such a position was that if we started to qualify the face of the record in any way, we would call into question other aspects of the McKenna McBride exercise.

The other issue on which we spent most of our time during the October discussion was in relation to the question of the effect of the B.C. Land Act Legislation on the establishment of Reserves during the time of the nineteen century reserve commissions. In particular, one interpretation of this legislation would have confirmed the necessity of publishing in the B.C. Gazette the decision of the B.C. Government or officials authorized by it to establish reserves for bands before a band could be considered to have a vested interest in such a reserve. We concluded that notwithstanding the basis for such an interpretation, we should maintain the position that at least with respect to the Campbell River and Quinsam Reserves there was no requirement to gazette notices of those reserves before they could be considered to have been established. The legislation in question was somewhat ambiguous and our decision reflected an attempt to support an interpretation which was, of course, reasonably arguable but which also was reflective of the treatment of these reserves during the period preceeding the McKenna McBride report implementation.

I trust this memo meets your request and if you have any further concerns with the analysis I have presented in my various memos I would most appreciate hearing from you. If I can provide you with any further information, recollections or analysis on the matter I would be pleased to do so.

M.T.

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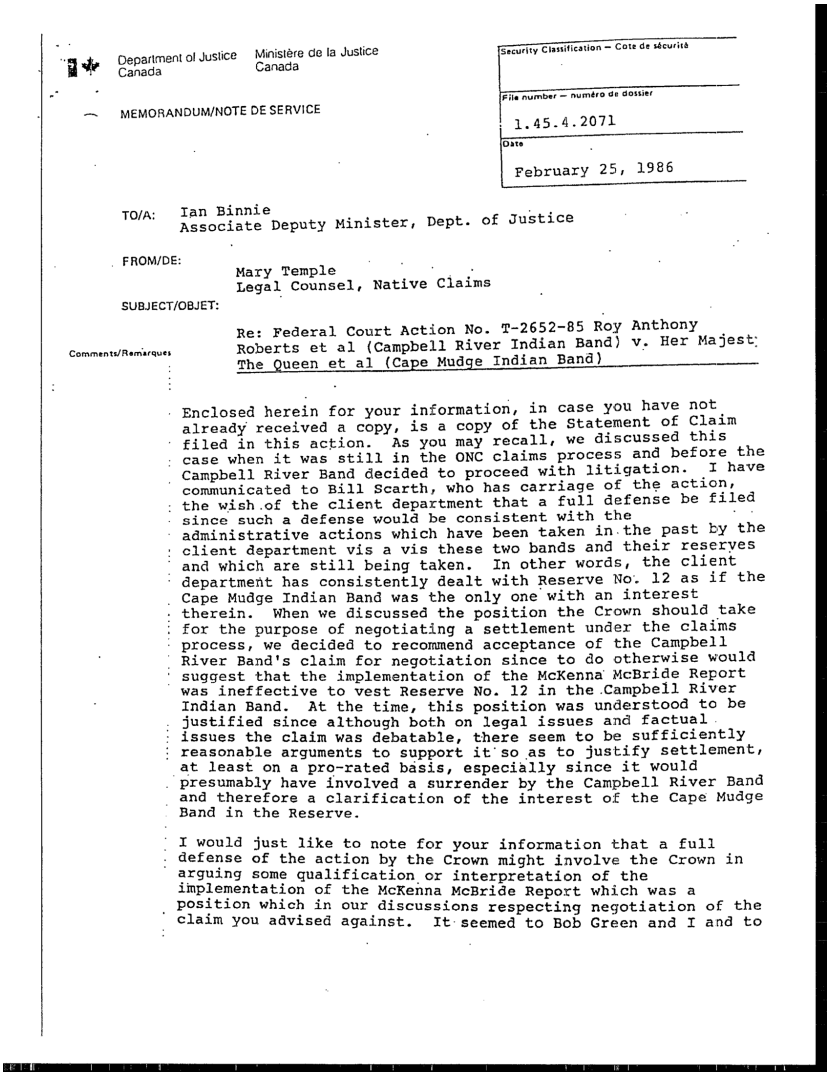

Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité

File number – numéro de dossier: 1.45.4.2071

Date: February 25, 1986

TO/A: Ian Binnie
Associate Deputy Minister, Dept. of Justice

FROM/DE: Mary Temple
Legal Counsel, Native Claims

SUBJECT/OBJET: Re: Federal Court Action No. T-2652-85 Roy Anthony Roberts et al (Campbell River Indian Band) v. Her Majest The Queen et al (Cape Mudge Indian Band)

Comments/Remarques

Enclosed herein for your information, in case you have not already received a copy, is a copy of the Statement of Claim filed in this action. As you may recall, we discussed this case when it was still in the ONC claims process and before the Campbell River Band decided to proceed with litigation. I have communicated to Bill Scarth, who has carriage of the action, the wish of the client department that a full defense be filed since such a defense would be consistent with the administrative actions which have been taken in the past by the client department vis a vis these two bands and their reserves and which are still being taken. In other words, the client department has consistently dealt with Reserve No. 12 as if the Cape Mudge Indian Band was the only one with an interest therein. When we discussed the position the Crown should take for the purpose of negotiating a settlement under the claims process, we decided to recommend acceptance of the Campbell River Band's claim for negotiation since to do otherwise would suggest that the implementation of the McKenna McBride Report was ineffective to vest Reserve No. 12 in the Campbell River Indian Band. At the time, this position was understood to be justified since although both on legal issues and factual issues the claim was debatable, there seem to be sufficiently reasonable arguments to support it so as to justify settlement, at least on a pro-rated basis, especially since it would presumably have involved a surrender by the Campbell River Band and therefore a clarification of the interest of the Cape Mudge Band in the Reserve.

I would just like to note for your information that a full defense of the action by the Crown might involve the Crown in arguing some qualification or interpretation of the implementation of the McKenna McBride Report which was a position which in our discussions respecting negotiation of the claim you advised against. It seemed to Bob Green and I and to

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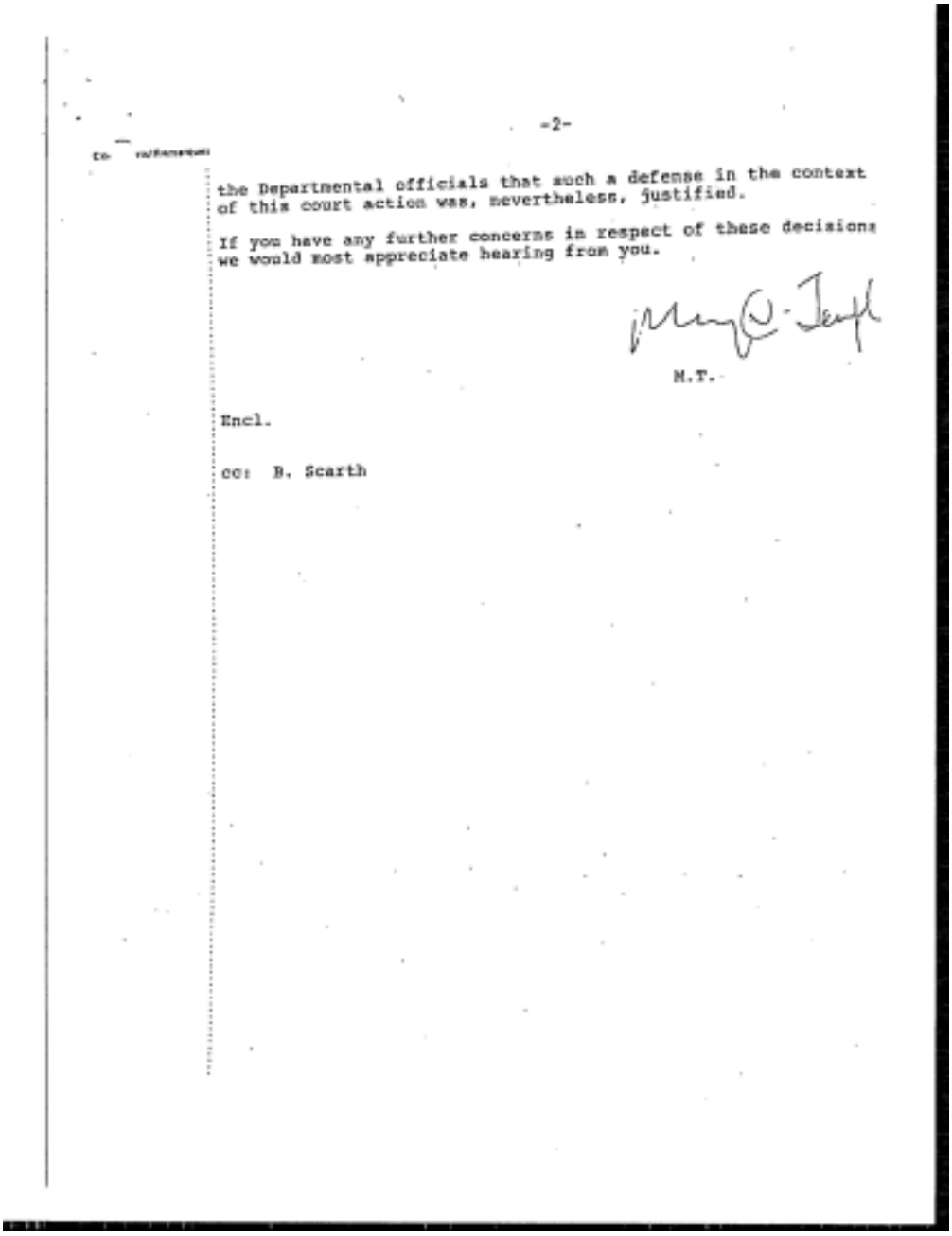

-2-

the Departmental officials that such a defense in the context of this court action was, nevertheless, justified.

If you have any further concerns in respect of these decisions we would most appreciate hearing from you.

M.T.

Encl.

cc: B. Scarth

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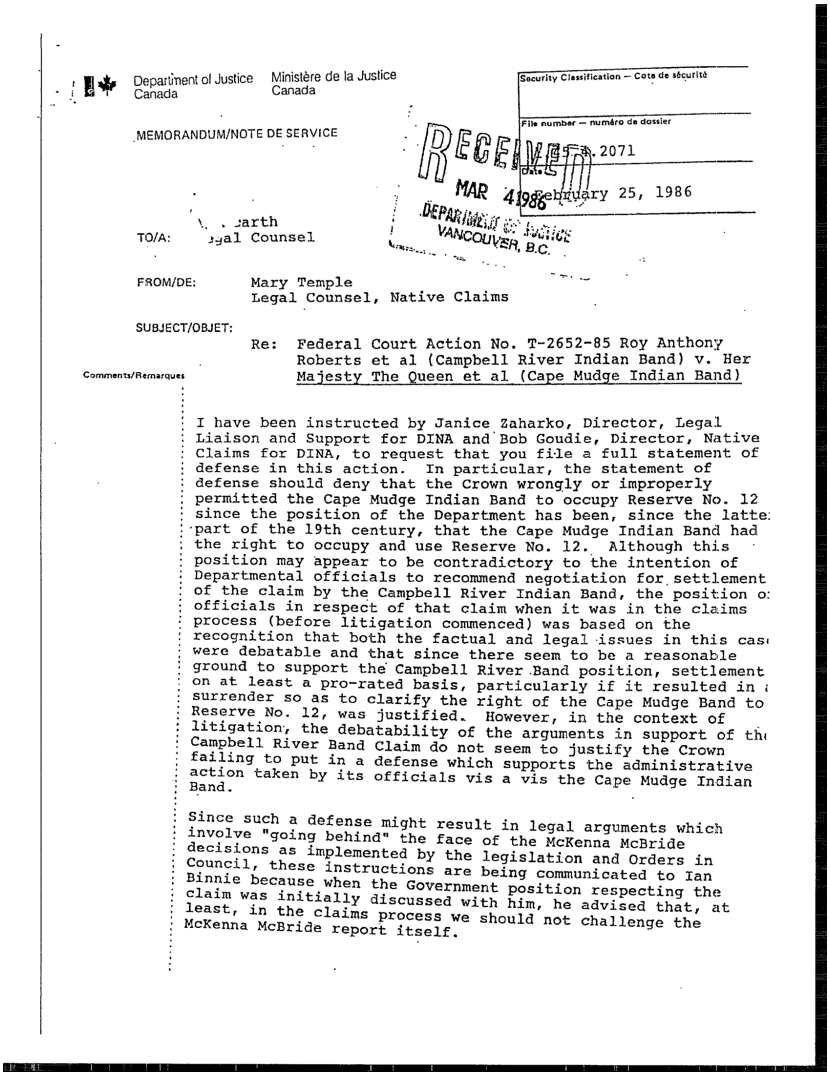

Department of Justice Canada / Ministère de la Justice Canada

Security Classification — Cote de sécurité

File number — numéro de dossier

Date: February 25, 1986

RECEIVED
MAR 4 1986
DEPARTMENT OF JUSTICE
VANCOUVER, B.C.

MEMORANDUM/NOTE DE SERVICE

TO/A: [illegible]arth
[illegible]gal Counsel

FROM/DE: Mary Temple
Legal Counsel, Native Claims

SUBJECT/OBJET:

Re: Federal Court Action No. T-2652-85 Roy Anthony Roberts et al (Campbell River Indian Band) v. Her Majesty The Queen et al (Cape Mudge Indian Band)

Comments/Remarques

I have been instructed by Janice Zaharko, Director, Legal Liaison and Support for DINA and Bob Goudie, Director, Native Claims for DINA, to request that you file a full statement of defense in this action. In particular, the statement of defense should deny that the Crown wrongly or improperly permitted the Cape Mudge Indian Band to occupy Reserve No. 12 since the position of the Department has been, since the latte part of the 19th century, that the Cape Mudge Indian Band had the right to occupy and use Reserve No. 12. Although this position may appear to be contradictory to the intention of Departmental officials to recommend negotiation for settlement of the claim by the Campbell River Indian Band, the position o officials in respect of that claim when it was in the claims process (before litigation commenced) was based on the recognition that both the factual and legal issues in this cas were debatable and that since there seem to be a reasonable ground to support the Campbell River Band position, settlement on at least a pro-rated basis, particularly if it resulted in surrender so as to clarify the right of the Cape Mudge Band to Reserve No. 12, was justified. However, in the context of litigation, the debatability of the arguments in support of th Campbell River Band Claim do not seem to justify the Crown failing to put in a defense which supports the administrative action taken by its officials vis a vis the Cape Mudge Indian Band.

Since such a defense might result in legal arguments which involve "going behind" the face of the McKenna McBride decisions as implemented by the legislation and Orders in Council, these instructions are being communicated to Ian Binnie because when the Government position respecting the claim was initially discussed with him, he advised that, at least, in the claims process we should not challenge the McKenna McBride report itself.

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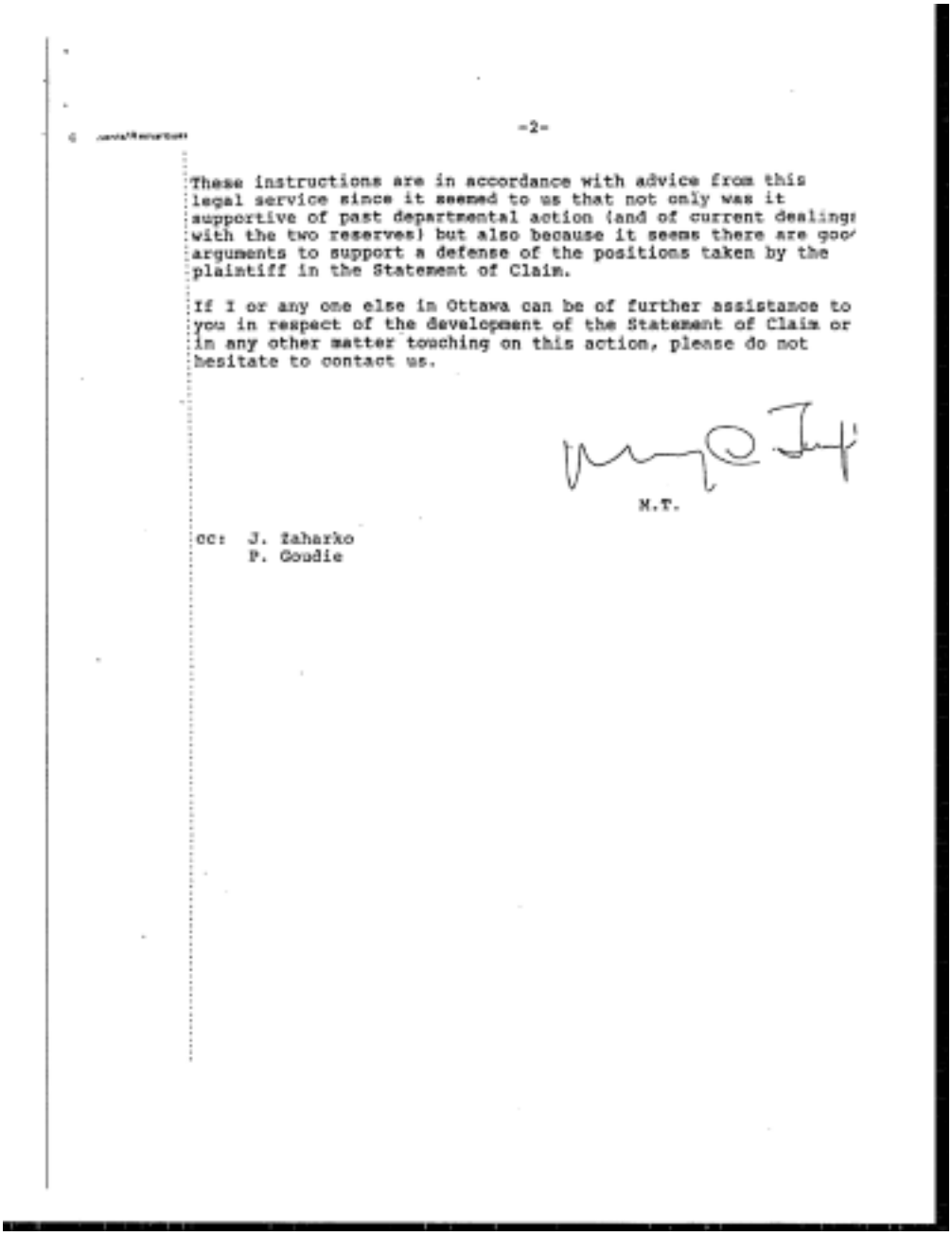

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These instructions are in accordance with advice from this legal service since it seemed to us that not only was it supportive of past departmental action (and of current dealings with the two reserves) but also because it seems there are good arguments to support a defense of the positions taken by the plaintiff in the Statement of Claim.

If I or any one else in Ottawa can be of further assistance to you in respect of the development of the Statement of Claim or in any other matter touching on this action, please do not hesitate to contact us.

M.T.

cc: J. Zaharko
P. Goudie

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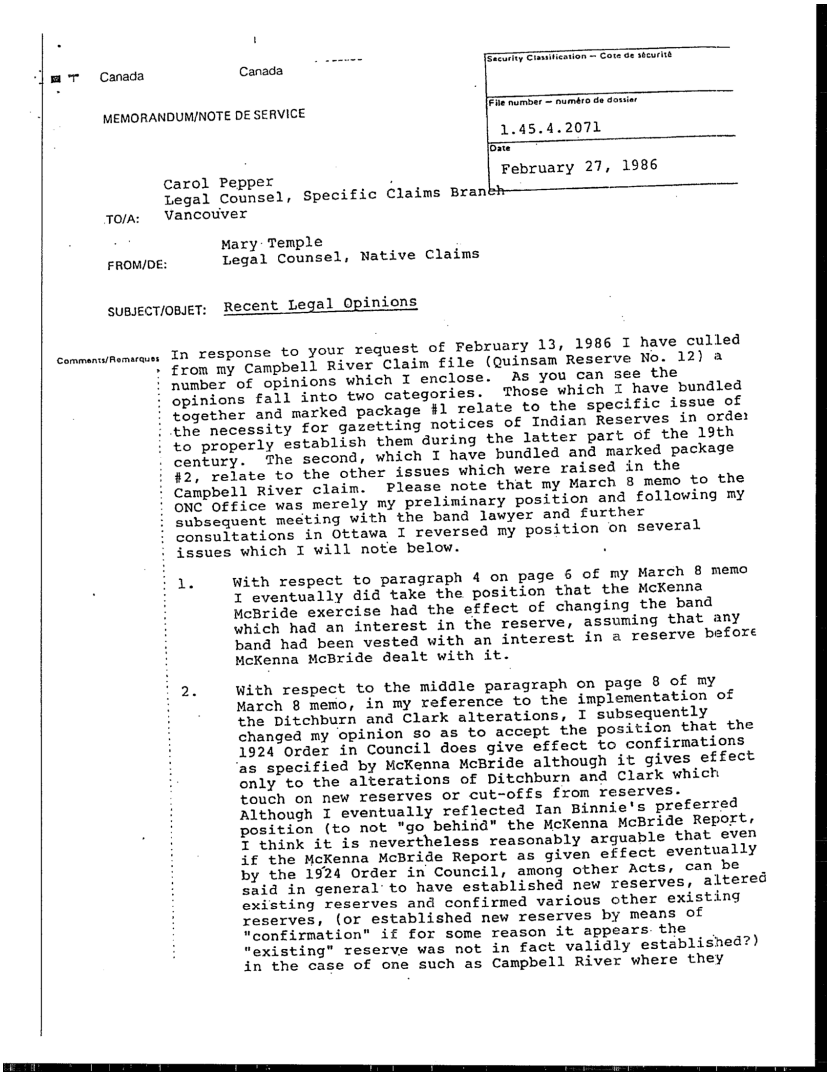

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MEMORANDUM/NOTE DE SERVICE

Security Classification — Cote de sécurité

File number — numéro de dossier
1.45.4.2071

Date
February 27, 1986

TO/A: Carol Pepper
Legal Counsel, Specific Claims Branch
Vancouver

FROM/DE: Mary Temple
Legal Counsel, Native Claims

SUBJECT/OBJET: Recent Legal Opinions

Comments/Remarques

In response to your request of February 13, 1986 I have culled from my Campbell River Claim file (Quinsam Reserve No. 12) a number of opinions which I enclose. As you can see the opinions fall into two categories. Those which I have bundled together and marked package #1 relate to the specific issue of the necessity for gazetting notices of Indian Reserves in order to properly establish them during the latter part of the 19th century. The second, which I have bundled and marked package #2, relate to the other issues which were raised in the Campbell River claim. Please note that my March 8 memo to the ONC Office was merely my preliminary position and following my subsequent meeting with the band lawyer and further consultations in Ottawa I reversed my position on several issues which I will note below.

1. With respect to paragraph 4 on page 6 of my March 8 memo I eventually did take the position that the McKenna McBride exercise had the effect of changing the band which had an interest in the reserve, assuming that any band had been vested with an interest in a reserve before McKenna McBride dealt with it.

2. With respect to the middle paragraph on page 8 of my March 8 memo, in my reference to the implementation of the Ditchburn and Clark alterations, I subsequently changed my opinion so as to accept the position that the 1924 Order in Council does give effect to confirmations as specified by McKenna McBride although it gives effect only to the alterations of Ditchburn and Clark which touch on new reserves or cut-offs from reserves. Although I eventually reflected Ian Binnie's preferred position (to not "go behind" the McKenna McBride Report, I think it is nevertheless reasonably arguable that even if the McKenna McBride Report as given effect eventually by the 1924 Order in Council, among other Acts, can be said in general to have established new reserves, altered existing reserves and confirmed various other existing reserves, (or established new reserves by means of "confirmation" if for some reason it appears the "existing" reserve was not in fact validly established?) in the case of one such as Campbell River where they

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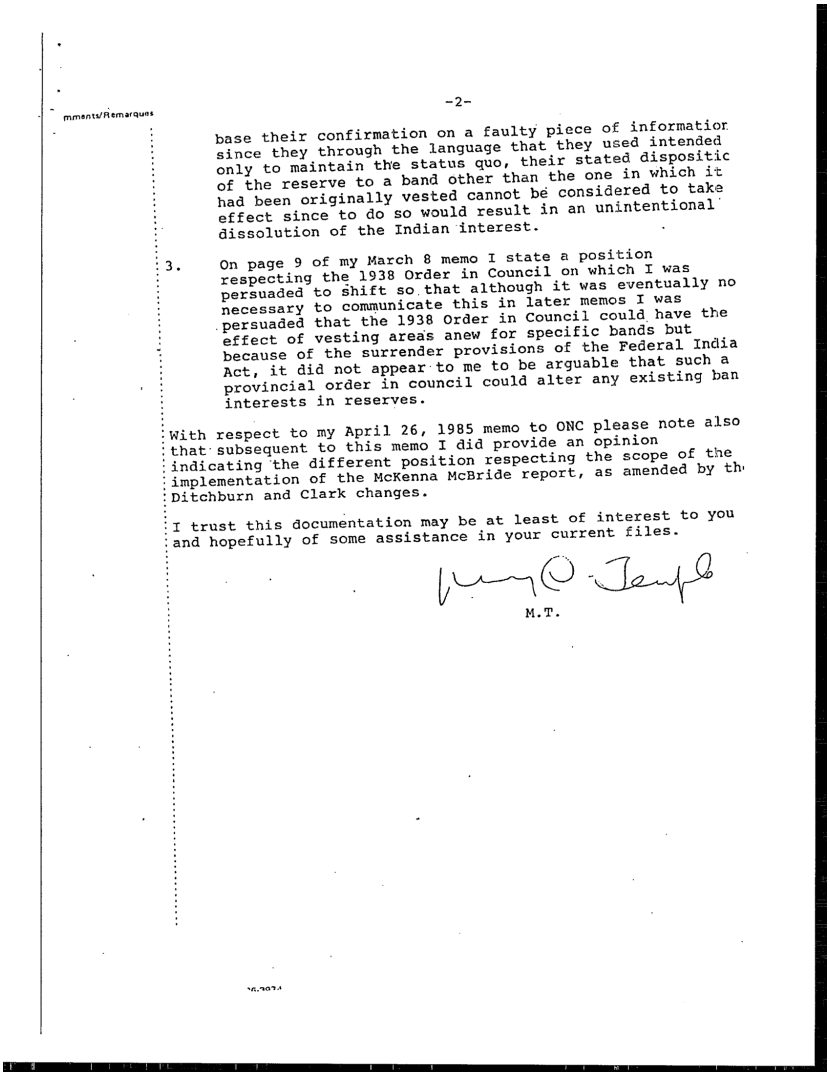

mments/Remarques

-2-

base their confirmation on a faulty piece of informatior since they through the language that they used intended only to maintain the status quo, their stated dispositic of the reserve to a band other than the one in which it had been originally vested cannot be considered to take effect since to do so would result in an unintentional dissolution of the Indian interest.

3. On page 9 of my March 8 memo I state a position respecting the 1938 Order in Council on which I was persuaded to shift so that although it was eventually no necessary to communicate this in later memos I was persuaded that the 1938 Order in Council could have the effect of vesting areas anew for specific bands but because of the surrender provisions of the Federal India Act, it did not appear to me to be arguable that such a provincial order in council could alter any existing ban interests in reserves.

With respect to my April 26, 1985 memo to ONC please note also that subsequent to this memo I did provide an opinion indicating the different position respecting the scope of the implementation of the McKenna McBride report, as amended by th Ditchburn and Clark changes.

I trust this documentation may be at least of interest to you and hopefully of some assistance in your current files.

M.T.

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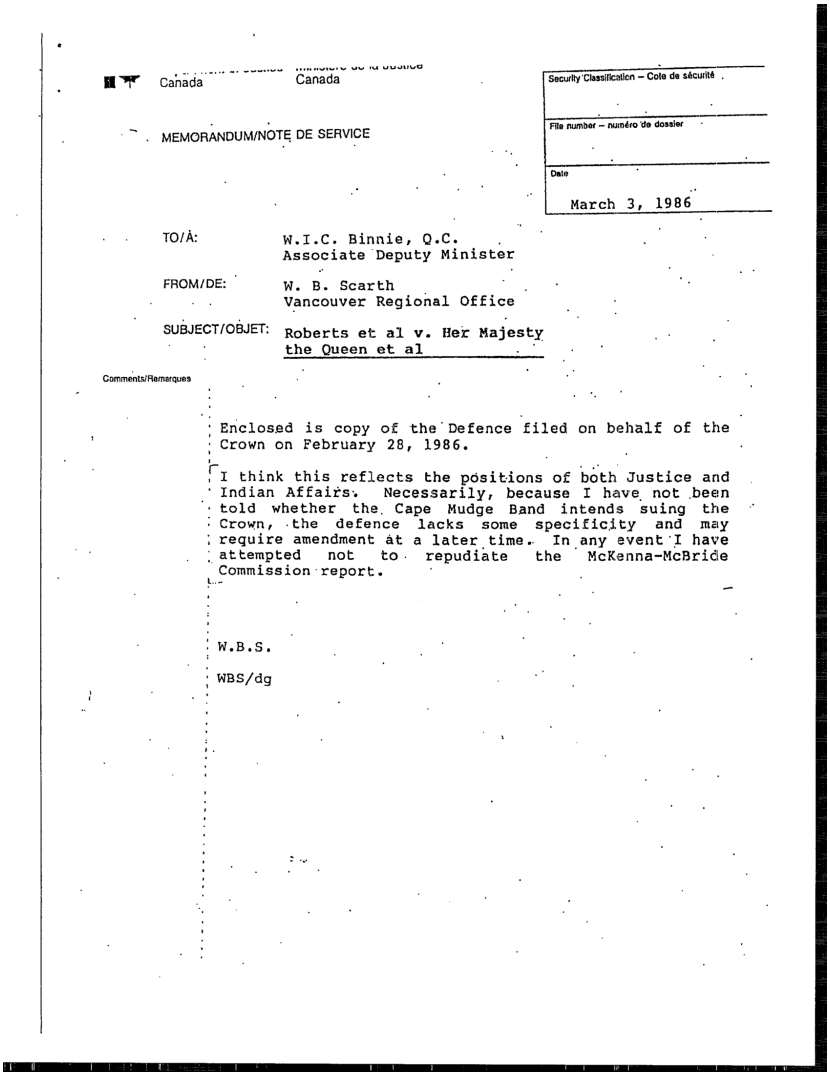

Canada Canada

Security Classification – Cote de sécurité

File number – numéro de dossier

Date

March 3, 1986

MEMORANDUM/NOTE DE SERVICE

TO/À: W.I.C. Binnie, Q.C.
Associate Deputy Minister

FROM/DE: W. B. Scarth
Vancouver Regional Office

SUBJECT/OBJET: Roberts et al v. Her Majesty the Queen et al

Comments/Remarques

Enclosed is copy of the Defence filed on behalf of the Crown on February 28, 1986.

I think this reflects the positions of both Justice and Indian Affairs. Necessarily, because I have not been told whether the Cape Mudge Band intends suing the Crown, the defence lacks some specificity and may require amendment at a later time. In any event I have attempted not to repudiate the McKenna-McBride Commission report.

W.B.S.

WBS/dg

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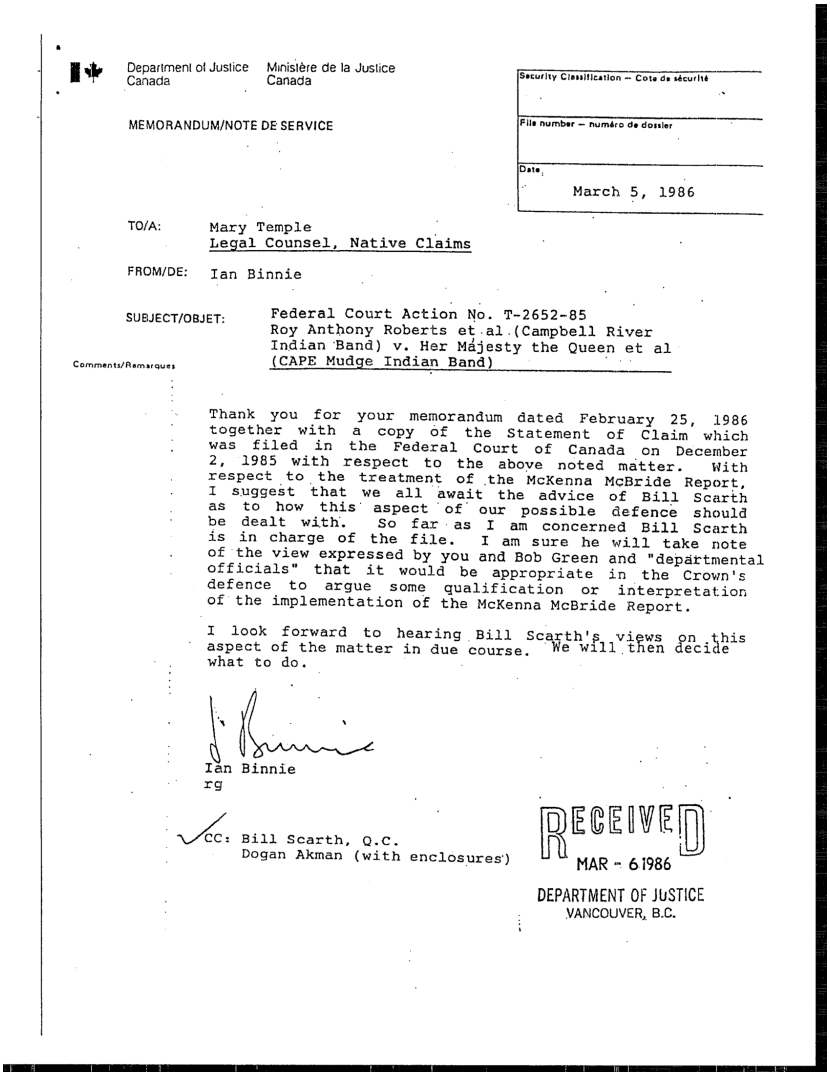

Department of Justice Canada / Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier

Date: March 5, 1986

MEMORANDUM/NOTE DE SERVICE

TO/A: Mary Temple
Legal Counsel, Native Claims

FROM/DE: Ian Binnie

SUBJECT/OBJET: Federal Court Action No. T-2652-85
Roy Anthony Roberts et al (Campbell River Indian Band) v. Her Majesty the Queen et al (CAPE Mudge Indian Band)

Comments/Remarques

Thank you for your memorandum dated February 25, 1986 together with a copy of the Statement of Claim which was filed in the Federal Court of Canada on December 2, 1985 with respect to the above noted matter. With respect to the treatment of the McKenna McBride Report, I suggest that we all await the advice of Bill Scarth as to how this aspect of our possible defence should be dealt with. So far as I am concerned Bill Scarth is in charge of the file. I am sure he will take note of the view expressed by you and Bob Green and "departmental officials" that it would be appropriate in the Crown's defence to argue some qualification or interpretation of the implementation of the McKenna McBride Report.

I look forward to hearing Bill Scarth's views on this aspect of the matter in due course. We will then decide what to do.

Ian Binnie
rg

cc: Bill Scarth, Q.C.
Dogan Akman (with enclosures)

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DEPARTMENT OF JUSTICE
VANCOUVER, B.C.

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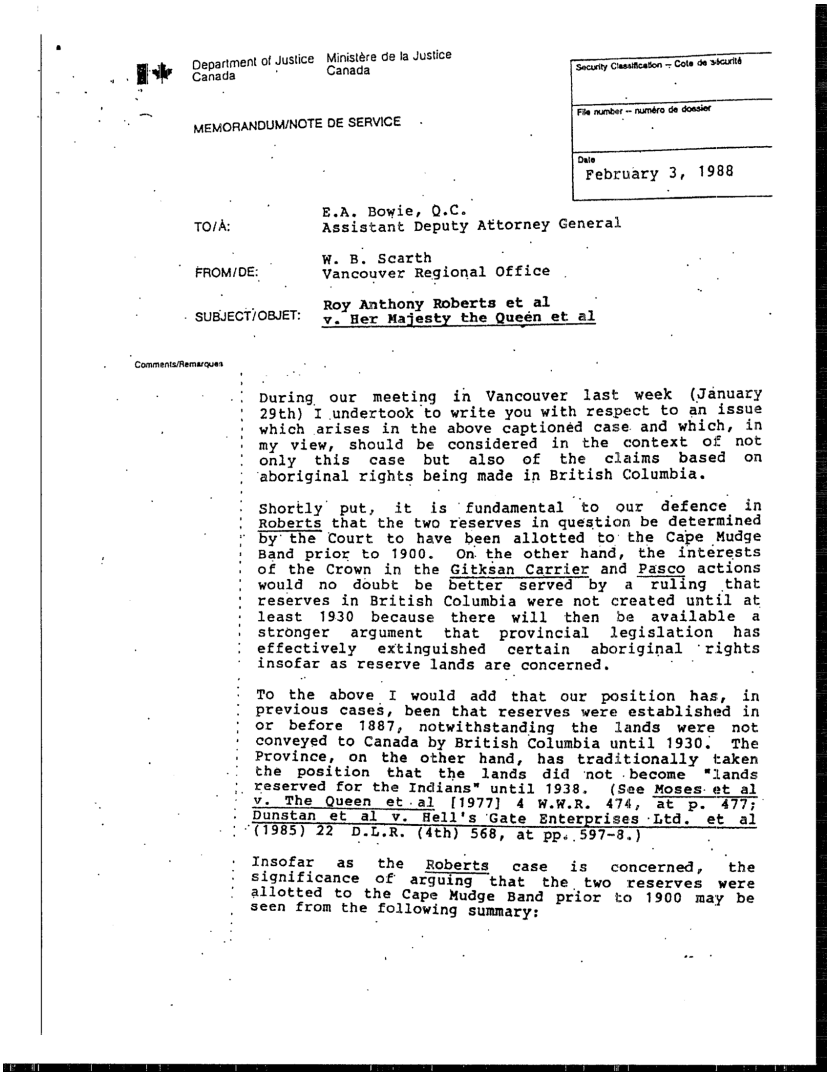

Department of Justice Canada / Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier

Date: February 3, 1988

MEMORANDUM/NOTE DE SERVICE

TO/À: E.A. Bowie, Q.C.
Assistant Deputy Attorney General

FROM/DE: W. B. Scarth
Vancouver Regional Office

SUBJECT/OBJET: **Roy Anthony Roberts et al v. Her Majesty the Queen et al**

Comments/Remarques

During our meeting in Vancouver last week (January 29th) I undertook to write you with respect to an issue which arises in the above captioned case and which, in my view, should be considered in the context of not only this case but also of the claims based on aboriginal rights being made in British Columbia.

Shortly put, it is fundamental to our defence in Roberts that the two reserves in question be determined by the Court to have been allotted to the Cape Mudge Band prior to 1900. On the other hand, the interests of the Crown in the Gitksan Carrier and Pasco actions would no doubt be better served by a ruling that reserves in British Columbia were not created until at least 1930 because there will then be available a stronger argument that provincial legislation has effectively extinguished certain aboriginal rights insofar as reserve lands are concerned.

To the above I would add that our position has, in previous cases, been that reserves were established in or before 1887, notwithstanding the lands were not conveyed to Canada by British Columbia until 1930. The Province, on the other hand, has traditionally taken the position that the lands did not become "lands reserved for the Indians" until 1938. (See Moses et al v. The Queen et al [1977] 4 W.W.R. 474, at p. 477; Dunstan et al v. Hell's Gate Enterprises Ltd. et al (1985) 22 D.L.R. (4th) 568, at pp. 597-8.)

Insofar as the Roberts case is concerned, the significance of arguing that the two reserves were allotted to the Cape Mudge Band prior to 1900 may be seen from the following summary:

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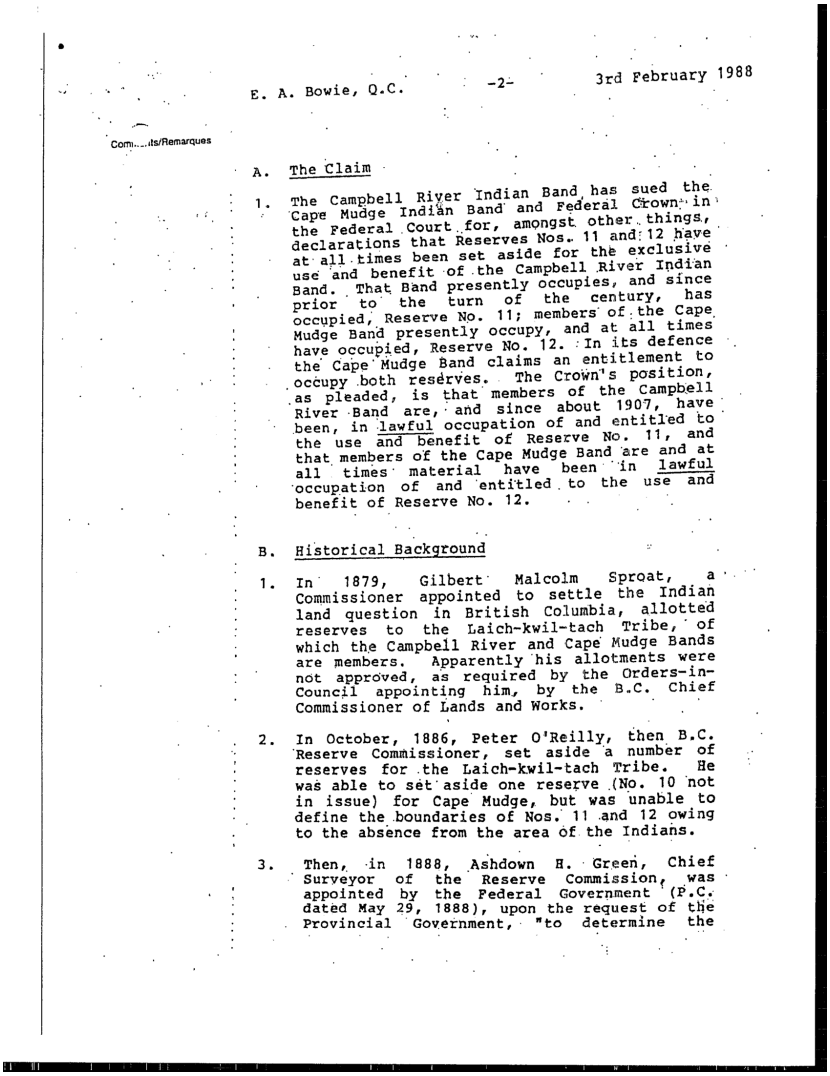

E. A. Bowie, Q.C. -2- 3rd February 1988

Com...its/Remarques

A. The Claim

1. The Campbell River Indian Band has sued the Cape Mudge Indian Band and Federal Crown in the Federal Court for, amongst other things, declarations that Reserves Nos. 11 and 12 have at all times been set aside for the exclusive use and benefit of the Campbell River Indian Band. That Band presently occupies, and since prior to the turn of the century, has occupied, Reserve No. 11; members of the Cape Mudge Band presently occupy, and at all times have occupied, Reserve No. 12. In its defence the Cape Mudge Band claims an entitlement to occupy both reserves. The Crown's position, as pleaded, is that members of the Campbell River Band are, and since about 1907, have been, in lawful occupation of and entitled to the use and benefit of Reserve No. 11, and that members of the Cape Mudge Band are and at all times material have been in lawful occupation of and entitled to the use and benefit of Reserve No. 12.

B. Historical Background

1. In 1879, Gilbert Malcolm Sproat, a Commissioner appointed to settle the Indian land question in British Columbia, allotted reserves to the Laich-kwil-tach Tribe, of which the Campbell River and Cape Mudge Bands are members. Apparently his allotments were not approved, as required by the Orders-in-Council appointing him, by the B.C. Chief Commissioner of Lands and Works.

2. In October, 1886, Peter O'Reilly, then B.C. Reserve Commissioner, set aside a number of reserves for the Laich-kwil-tach Tribe. He was able to set aside one reserve (No. 10 not in issue) for Cape Mudge, but was unable to define the boundaries of Nos. 11 and 12 owing to the absence from the area of the Indians.

3. Then, in 1888, Ashdown H. Green, Chief Surveyor of the Reserve Commission, was appointed by the Federal Government (P.C. dated May 29, 1888), upon the request of the Provincial Government, "to determine the

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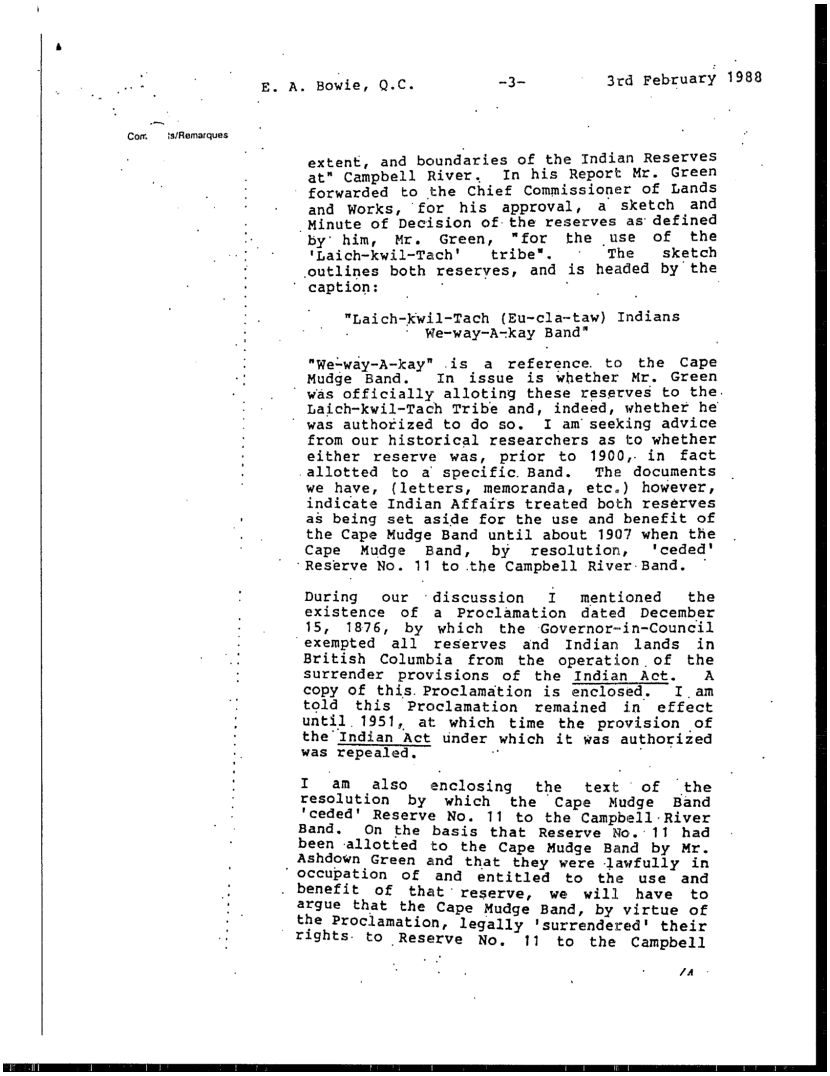

E. A. Bowie, Q.C. -3- 3rd February 1988

Corr. ts/Remarques

extent, and boundaries of the Indian Reserves at" Campbell River. In his Report Mr. Green forwarded to the Chief Commissioner of Lands and Works, for his approval, a sketch and Minute of Decision of the reserves as defined by him, Mr. Green, "for the use of the 'Laich-kwil-Tach' tribe". The sketch outlines both reserves, and is headed by the caption:

"Laich-kwil-Tach (Eu-cla-taw) Indians
We-way-A-kay Band"

"We-way-A-kay" is a reference to the Cape Mudge Band. In issue is whether Mr. Green was officially alloting these reserves to the Laich-kwil-Tach Tribe and, indeed, whether he was authorized to do so. I am seeking advice from our historical researchers as to whether either reserve was, prior to 1900, in fact allotted to a specific Band. The documents we have, (letters, memoranda, etc.) however, indicate Indian Affairs treated both reserves as being set aside for the use and benefit of the Cape Mudge Band until about 1907 when the Cape Mudge Band, by resolution, 'ceded' Reserve No. 11 to the Campbell River Band.

During our discussion I mentioned the existence of a Proclamation dated December 15, 1876, by which the Governor-in-Council exempted all reserves and Indian lands in British Columbia from the operation of the surrender provisions of the Indian Act. A copy of this Proclamation is enclosed. I am told this Proclamation remained in effect until 1951, at which time the provision of the Indian Act under which it was authorized was repealed.

I am also enclosing the text of the resolution by which the Cape Mudge Band 'ceded' Reserve No. 11 to the Campbell River Band. On the basis that Reserve No. 11 had been allotted to the Cape Mudge Band by Mr. Ashdown Green and that they were lawfully in occupation of and entitled to the use and benefit of that reserve, we will have to argue that the Cape Mudge Band, by virtue of the Proclamation, legally 'surrendered' their rights to Reserve No. 11 to the Campbell

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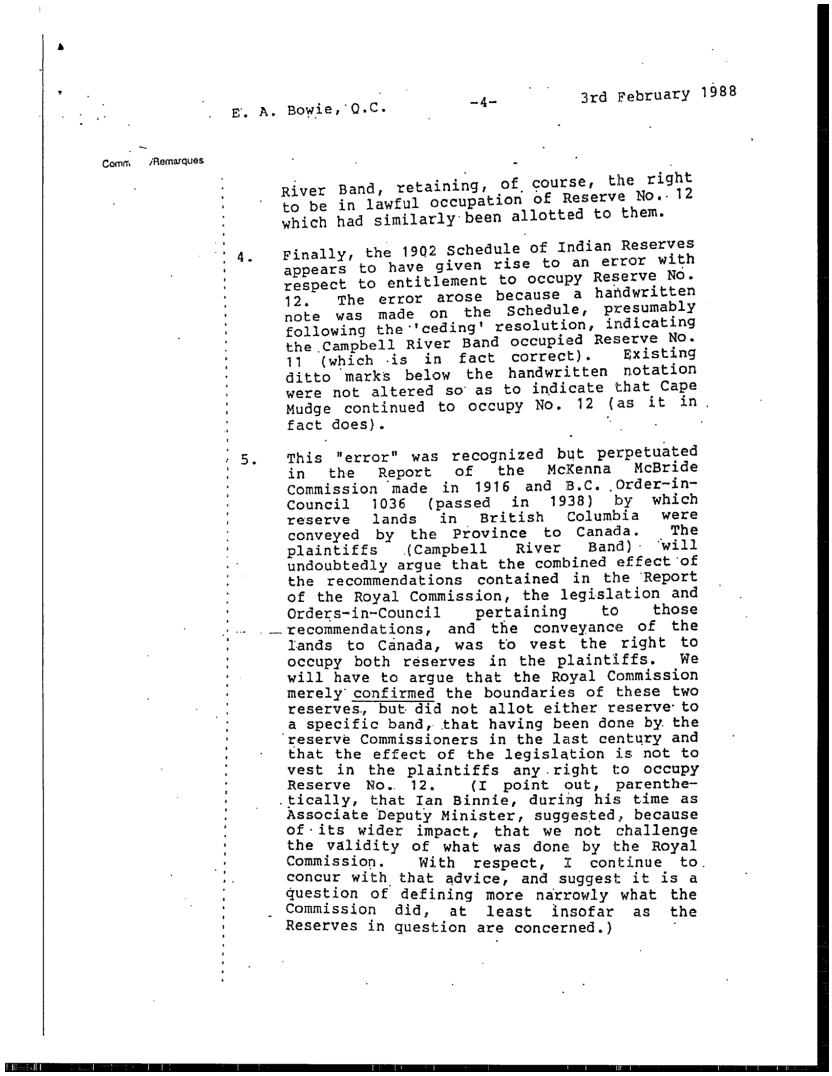

E. A. Bowie, Q.C. -4- 3rd February 1988

Comm. /Remarques

River Band, retaining, of course, the right to be in lawful occupation of Reserve No. 12 which had similarly been allotted to them.

4. Finally, the 1902 Schedule of Indian Reserves appears to have given rise to an error with respect to entitlement to occupy Reserve No. 12. The error arose because a handwritten note was made on the Schedule, presumably following the 'ceding' resolution, indicating the Campbell River Band occupied Reserve No. 11 (which is in fact correct). Existing ditto marks below the handwritten notation were not altered so as to indicate that Cape Mudge continued to occupy No. 12 (as it in fact does).

5. This "error" was recognized but perpetuated in the Report of the McKenna McBride Commission made in 1916 and B.C. Order-in-Council 1036 (passed in 1938) by which reserve lands in British Columbia were conveyed by the Province to Canada. The plaintiffs (Campbell River Band) will undoubtedly argue that the combined effect of the recommendations contained in the Report of the Royal Commission, the legislation and Orders-in-Council pertaining to those recommendations, and the conveyance of the lands to Canada, was to vest the right to occupy both reserves in the plaintiffs. We will have to argue that the Royal Commission merely confirmed the boundaries of these two reserves, but did not allot either reserve to a specific band, that having been done by the reserve Commissioners in the last century and that the effect of the legislation is not to vest in the plaintiffs any right to occupy Reserve No. 12. (I point out, parenthetically, that Ian Binnie, during his time as Associate Deputy Minister, suggested, because of its wider impact, that we not challenge the validity of what was done by the Royal Commission. With respect, I continue to concur with that advice, and suggest it is a question of defining more narrowly what the Commission did, at least insofar as the Reserves in question are concerned.)

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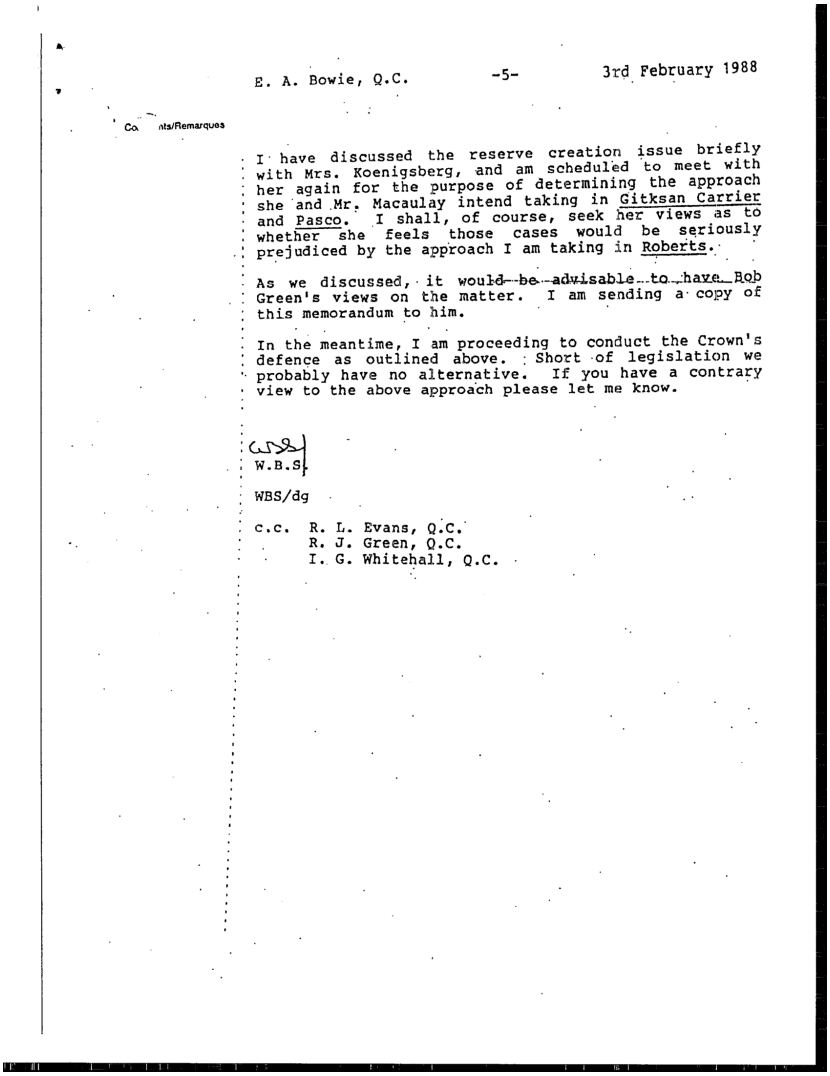

E. A. Bowie, Q.C. -5- 3rd February 1988

Co nts/Remarques

I have discussed the reserve creation issue briefly with Mrs. Koenigsberg, and am scheduled to meet with her again for the purpose of determining the approach she and Mr. Macaulay intend taking in Gitksan Carrier and Pasco. I shall, of course, seek her views as to whether she feels those cases would be seriously prejudiced by the approach I am taking in Roberts.

As we discussed, it would be advisable to have Bob Green's views on the matter. I am sending a copy of this memorandum to him.

In the meantime, I am proceeding to conduct the Crown's defence as outlined above. Short of legislation we probably have no alternative. If you have a contrary view to the above approach please let me know.

W.B.S.

WBS/dg

c.c. R. L. Evans, Q.C.
R. J. Green, Q.C.
I. G. Whitehall, Q.C.

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End of Document

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1997 CarswellNat 2244
Federal Court of Canada — Trial Division

Samson Indian Band & Nation v. Canada

1997 CarswellNat 2244, 1997 CarswellNat 2820, [1997] F.C.J. No. 1652, [1998] 3 F.C. 3, 141 F.T.R. 109, 76 A.C.W.S. (3d) 76

Chief Victor Buffalo acting on his own behalf and on behalf of all the other members of the Samson Indian Nation and Band and The Samson Indian Band and Nation, Applicants (Plaintiffs) and Her Majesty the Queen in Right of Canada, and The Minister of Indian Affairs and Northern Development, and The Minister of Finance, Respondents (Defendants)

Chief John Ermineskin, Lawrence Wildcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Lee, Lester Fraynn, the elected Chief and Councillors of the Ermineskin Indian Band and Nation Suing on their own behalf and on behalf of the members of the Ermineskin Indian Band and Nation, Plaintiffs and Her Majesty the Queen in Right of Canada and Minister of Indian Affairs and Northern Development and Minister of Finance, Defendants

Teitelbaum J.

Judgment: December 8, 1997
Heard: October 21, 1997
Docket: T-2022-89, T-1254-92

Proceedings: affirmed *Samson Indian Band & Nation v. Canada* (1998), *(*sub nom. *Buffalo v. Canada (Minister of Indian Affairs & Northern Development))* 227 N.R. 386, *(*sub nom. *Buffalo v. Canada (Minister of Indian Affairs & Northern Development))* 151 F.T.R. 158 (note) (Fed. C.A.)

Counsel: *James O'Reilly*, for Plaintiff Victor Buffalo.
Ed Molstad Q.C., *Marco Poretti* and *Priscilla Kennedy*, for Plaintiff Victor Buffalo.
Marvin Storrow Q.C., *Joni Paulus* and *Maria Morellato*, for Plaintiff J. Ermineskin.
Alan Macleod Q.C., *Clark Hunter*, *Tom Valentine*, *Mary Comeau* and *Wendy Johnston*, for Defendants.

Subject: Civil Practice and Procedure

APPLICATION for recusal of judge.

***Teitelbaum J.*:**

Reasons for Order

1 This is a Notice of Motion filed into the Federal Court of Canada Registry at Calgary, Alberta, on the 16th day of October, 1997 by the plaintiffs, Chief Victor Buffalo and the Samson Indian Band and Nation, for the following relief, as stated therein:

> 1. An Order declaring that the appointment of the trial judge in these actions is of no force and effect and, *inter alia*, contrary to the *Federal Court Act*, R.S.C. 1985, c. F-7, as am., ss. 3, 6(3) and 15(2) as well as the *Charter of Rights and Freedoms* s. 7 and the *Constitution Act*, 1867, preamble and s. 101;
>
> 2. An Order directing Mr. Justice Teitelbaum to disclose, or alternatively, the disclosure by Mr. Justice Teitelbaum of his relationships since 1956, including the nature and degree thereof, with the Honourable Brian Mulroney, former Prime Minister of Canada; Bernard Roy, former Principal Secretary to the Honourable Brian Mulroney; with Peter G. White, Secretary to the Honourable Brian Mulroney from 1983 to 1986; with Senator W. David Angus, former Treasurer of the Conservative Party of Canada, with the Honourable W. Warren Allmand, a former classmate and former Minister of Indian Affairs and Northern Development; with G. Ian Watson, apparently a former classmate and former Chairman of the Standing Committee of Indian Affairs, and with the following persons who attended McGill Faculty of Law at the same time as Mr. Justice Teitelbaum: former Cabinet Minister Donald J. Johnston; P. Michael Pitfield, former Secretary to the Privy Council; and Yves L. Fortier, Q.C., former Ambassador to the United Nations;
>
> 3. An Order directing Mr. Justice Teitelbaum to disclose, or alternatively the disclosure by Mr. Justice Teitelbaum of his relationships since 1956, including the nature and degree thereof, with any persons he met or knew who were or are:
>
> > (a) Members of the House of Commons or the Senate, including all Committees thereof;
> >
> > (b) Members of the Federal Government;
> >
> > (c) Employees of the Federal Government;
> >
> > (d) Persons on the staff of, or who acted as an advisor to, any Prime Minister or any Minister of the Federal Government;

(e) Persons working for or associated with the Federal Liberal Party or the Federal Conservative Party;

4. An Order directing Mr. Justice Teitelbaum to disclose, or alternatively the disclosure by Mr. Justice Teitelbaum of his activities relating to the Conservative Party of Canada, including any role as a fund raiser and any other political activities;

5. An Order that Mr. Justice Teitelbaum recuse himself as Trial Judge in these proceedings, or alternatively, the recusal by Mr. Justice Teitelbaum as Trial Judge in these proceedings.

2 The grounds for this application, as listed in the Notice of Motion, are numerous. The plaintiffs list 19 grounds. To better understand this Notice of Motion, I believe it necessary to list, within the body of this decision, all 19 grounds.

3 The grounds, as listed in the Notice of Motion, are

1. The *Federal Court Act*, s. 15(2) requires the Associate Chief Justice to make arrangements for judges to hold courts. Section 6(3) provides that the senior judge shall exercise the powers of the Associate Chief Justice when the Associate Chief Justice is unable to act;

2. The Associate Chief Justice is unable or unwilling to act in respect of the selection of a trial judge in these proceedings. Consequently the powers of the Associate Chief Judge in respect to the selection of Mr. Justice Teitelbaum as the designated trial judge should have been exercised by the senior judge;

3. The case manager herein, MacKay, J. indicated on a number of occasions that the power had been exercised by a "Committee" of three Justices contrary to section 6(3) of the *Federal Court Act*;

4. The composition of the "Committee" remains a secret contrary to section 3 of the *Federal Court Act*, the *Charter of Rights and Freedoms*, section 7, and to the *Constitution Act, 1867*, *inter alia*, the preamble and section 101. However, even if the appointment process had been open and publicly disclosed, such" Committee" appointment is still contrary to the *Federal Court Act*. There is no authority for such a "Committee" under the provisions of the *Federal Court Act* let alone any authority for a" Star Chamber" type of procedure;

5. In respect to disclosure Orders and Relief requested, the case law, particularly that dealing with apprehension of bias, the Rule of Law and the fundamental principle of an open court system embodied in the *Charter of Rights and Freedoms*, section 7, the

Constitution Act, 1867, preamble and section 101 thereof, and in the *Federal Court Act*, section 3, require disclosure by the Trial Judge of all past and present relationships and activities of the Trial Judge related to the matters at issue in the action;

6. The case law further requires that the test for apprehension of bias involves the obtaining of information to which an applicant in practice may have no or little access. Only the decision-maker concerned may be aware of certain facts. The principles of natural justice and procedural fairness thus require disclosure to the applicants of all relevant facts. This was the procedure recently adopted by Madam Justice McGillis when faced with an issue of apprehension of bias;

7. The removal of Campbell, J. as the Trial Judge herein and the process followed for that purpose breach the principles of natural justice and procedural fairness, have undermined the confidence of Samson Plaintiffs in the Court and its selection process and give rise, in the circumstances of these proceedings, to a reasonable apprehension of institutional bias on the part of the Federal Court of Canada in respect to the designation of the Trial Judge;

8. The different procedure used by the Crown and accepted by the Associate Chief Justice and the procedure for recusal stipulated in the Order of MacKay, J. of October 10, 1997 further raise an apprehension of bias based on unequal treatment of litigants as between the Crown and aboriginal parties and breaches Samson Plaintiffs' constitutional rights under sections 7, 15 and 25 of the *Charter of Rights and Freedoms*;

9. The particular circumstances of these proceedings, including the Court's concurrence with the Crown's refusal to accept the case manager, MacKay, J., as the Trial Judge and the secret selection process for the designation of Mr. Justice Teitelbaum as the Trial Judge subsequent to the withdrawal of the Associate Chief Justice in July, 1997, from further participation in the selection of the trial judge at the request of Samson Plaintiffs, raises a reasonable apprehension of institutional bias or partiality in the particular circumstances of these proceedings;

10. The secret selection process for the designation of Mr. Justice Teitelbaum as the Trial Judge itself raises a reasonable apprehension of bias;

11. The bases for the apprehension of bias referred to above are compounded and reinforced by the judgment of the Federal Court of Appeal in *Sawridge Indian Band v. Canada (Minister of Indian Affairs & Northern Development)* (1988), 18 F.T.R. 32 (Fed. T.D.) where that Court found that there was a reasonable apprehension of bias on the part of the Trial Judge, a senior judge of this Court. The proceedings in which bias was found involved, *inter alia*, all the members of the Ermineskin Band, who are Plaintiffs

in T-1254-92, which proceedings raise similar issues to the proceedings instituted by Samson and which are proceeding jointly with the Samson proceedings;

12. Furthermore, the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship & Immigration) v. Tobiass* (1997), 118 C.C.C. (3d) 443 (S.C.C.) dated September 25, 1997, and the public perception reflected in the October 2, 1997 editorial in the Globe and Mail, to the effect that many of the judges of the Federal Court of Canada were members of Parliament, Cabinet Ministers, officials of the Federal Government or had prominent involvement with a federal political party, increase the perception of a reasonable apprehension of bias in respect to the designated trial judge, particularly in light of the grounds set forth below;

13. Samson Plaintiffs do not have full knowledge of the nature and degree of the relationships of the designated trial judge with the persons mentioned above in paragraphs 2 and 3 of the Orders or Relief sought of the applications, and in paragraph 6 hereof. However, these proceedings deal with issues which date back to prior to Treaty No. 6 of 1876 and deal in an important and significant manner with the actions and omissions of the Crown and Government of Canada, including employees and advisers to the Government, the Prime Minister and Ministers thereof, during that period. The questions in the proceedings directly involve the 1970's and the 1980's and include the entire period of time of the government presided over by the Honourable Brian Mulroney;

14. The Samson Proceedings involve, *inter alia*, constitutional, trust and treaty obligations of the Crown respecting the management of natural resources held in trust by the Crown, royalty moneys paid in trust to the Crown, the *Indian Act* throughout the period mentioned in the preceding paragraph, the constitutionality of provisions of the *Indian Act*, regulations under the *Indian Act*, the *Indian Oil* and *Gas Act* and regulations thereunder, the *Financial Administration Act*, the nature and scope of treaty rights and benefits, the rights of Samson Plaintiffs to programs and services under Treaty No. 6 and otherwise, and claims for substantial monetary damages. The major claims with respect to damages relate to the period from 1969 to date;

15. The acquaintances of Mr. Justice Teitelbaum with persons involved on behalf of the Crown related to the issues in this action, and, subject to full disclosure including the activities of Mr. Justice Teitelbaum for the Conservative Party of Canada give rise to a reasonable apprehension of bias in respect of Mr. Justice Teitelbaum as the Trial Judge;

16. In addition, the Trial Judge, in *Canadian Pacific Ltd. v. Matsqui Indian Band* (1996), 111 F.T.R. 161 (Fed. T.D.) and in *Roberts v. R.* (1995), 99 F.T.R. 1 (Fed. T.D.), set forth his views on and made comments respecting the *Indian Act*, self-government, trust and

> fiduciary obligations, limitations of actions, the maturity of Indian bands, the implied dependence of Indians as clinging to mother's apron, with the Crown impliedly being the mother, and awarded solicitor client costs against the Wewayakai Band, in those proceedings. These views, comments, determinations and perspectives of the designated trial judge individually and collectively give rise to a reasonable bias in respect to the designated Trial Judge in respect to the pre-determination of crucial issues in the proceedings herein;
>
> 17. That in all these circumstances, a reasonable and right-minded person, applying himself to the question and obtaining thereon the required information, viewing the matter realistically and practically - and having thought the matter through - would have a reasonable apprehension of bias in respect of Mr. Justice Teitelbaum as the Trial Judge in these proceedings;
>
> 18. Furthermore, in the light of all the circumstances, Samson Plaintiffs, who are members of a particular aboriginal community with its racial dynamics, including the existence of a history of discrimination against aboriginal peoples and knowing of developments to date relating to the trial judge in respect to these proceedings, have an even greater reasonable apprehension of bias;
>
> 19. A reasonable apprehension of bias is incompatible with fundamental justice as required by section 7 of the *Charter of Rights and Freedoms* and to the Rule of Law pursuant to the *Constitution Act, 1867* and *Charter* preambles and section 101 and requires Mr. Justice Teitelbaum to recuse himself.

4 As evidence for the present application, the plaintiffs Samson Indian Band and Nation et al have filed the affidavits of Phil Fontaine, National Chief of the Assembly of First Nations, Elijah Harper, a Treaty Indian who was Chief of the Red Sucker Lake First Nation and he remains" an Honorary Chief of the Red Sucker Lake First Nation", Victor Buffalo, Acting Chief of the Samson Indian Band and Nation, Florence Buffalo, Chief of the Samson Indian Band and Nation, Ovide Mercredi, former National Grand Chief and the affidavit of C. Allan Donovan, a Barrister and Solicitor who was one of the solicitors of record of the *Wewayakum Indian Band v. Canada* (1989), 25 F.T.R. 161 (S.C.C.) and the trial of *Roberts v. R. supra* (presided over by myself). This judgment is now in appeal before the Federal Court of Appeal.

5 Only one set of reasons was issued for both cases and in it I dismissed the action of the Wewayakai (Cape Mudge) Indian Band against the Crown with costs on a solicitor-client basis for the reasons stated in the judgment. The Court of Appeal will decide, upon hearing the appeal if, for the reasons I gave in the judgment, I was correct in using my discretion in the manner that I did. What is not in the affidavit of Mr. Donovan is that the counterclaim made by the Wewayakai

Indian Band against the Wewayakum (Campbell River) Indian Band was dismissed without costs nor that the Wewayakum Indian Band's claim against the Crown was also dismissed without costs.

6 Counsel for the plaintiffs Chief John Ermineskin et at in case T-1254-92 filed the affidavit of William Roberts, a fisherman and "a Hereditary Chief of the Wewayakum Indian Band ("Campbell River Band") who states that in the cases involving Cape Mudge Indian Band and Campbell River Indian Band and the Crown he was a witness. He states:

> 5. During my testimony, I was extensively and aggressively examined by the trial Judge, Mr. Justice Teitelbaum. The tone of the examination was such that I had the strong impression that the trial Judge was attempting to entrap me. I felt as though I, or someone in my family, was being accused of some serious wrongdoing in matters going back almost 50 years.
>
> 6. Due to the intensity of the examination and the remarks made by the trial Judge, I suffered greatly from stress and anxiety and as a result I was ill for several days afterwards.
>
> 7. I seriously considered reporting the trial Judge to the Judicial Counsel because of the treatment I received at his hands and I discussed this at the time with counsel. I felt that the attitude of the Judge was completely uncalled for and especially intimidating to a person not conversant with legal procedures or court cases.

7 William Roberts fails to state what were the remarks that were made that caused him to suffer greatly from stress and anxiety.

8 I have reviewed the transcript of the questions put to the witness during the trial. I am satisfied that I did not try to" entrap" Mr. Roberts but only to try to understand his evidence. In order to do so, I felt it necessary to ask many questions of this witness. Furthermore, to be a witness at a trial can cause stress and anxiety. This is perfectly normal. It has nothing to do with remarks made or not made.

9 Counsel also filed the affidavit of Gerry Ermineskin, elected Chief of the Ermineskin Indian Band.

10 With the exception of C. Allan Donovan and William Roberts, all affiants filed exhibits with their affidavits. One of these exhibits, Exhibit" U" to the affidavit of Victor Buffalo is a list of 266 cases decided by me and which, according to Victor Buffalo or, I should say," Samson's solicitors", were decided 74.1% of the time in favour of the "Crown" and, I assume, this gives Acting Chief Victor Buffalo a reasonable apprehension of bias of my impartiality. I have not gone through this list in any detail as I am satisfied that this allegation is a meaningless one. I decide each case before me on the evidence that is placed before me and on the applicable law. I do not count the percentage of cases decided for or against a party and then make a decision.

11 I do not intend to refute each and every allegation made by all the affiants. The grounds in the Notice of Motion reflect what the affiants state in their affidavits. The affiants speak of the process of the Court deciding that Mr. Justice Campbell should not be the trial judge, the "method" of how I was designated to be the trial judge and my "words and actions" arising from the cases of *Canadian Pacific Ltd. v. Matsqui Indian Band* (1996), 111 F.T.R. 161 (Fed. T.D.) and in the Wewayakum Indian Band cases (*supra*).

12 I believe it important that paragraphs 44, 45 and 46 of the affidavit of Victor Buffalo be reproduced in this decision and answered.

> 44. THAT I am advised by Samson's solicitors and do verily believe that when the former Prime Minister of Canada, The Honourable Brian Mulroney was asked recently as to whether he knew Mr. Justice Teitelbaum, he responded" Sure I know Max". As a result of this communication I do verily believe that Mr. Justice Teitelbaum is an acquaintance of the former Prime Minister of Canada, The Honourable Brian Mulroney. The Honourable Brian Mulroney was the Prime Minister and a member of the Cabinet when Mr. Justice Teitelbaum was appointed to the Federal Court in 1985. The Honourable Brian Mulroney was also Prime Minister between September 17th, 1984 and June 25th, 1993, a period during which many claims against the Crown arose in this action.
>
> 45. THAT I am advised by Samson's solicitors and do verily believe that Mr. Justice Teitelbaum attended at McGill Faculty of Law at the same time as The Honourable W. Warren Allmand, a former Minister of Indian Affairs and Northern Development, G. Ian Watson, a former Chair of the Standing Committee of Indian Affairs, The Honourable Donald J. Johnson, a former Cabinet Minister and P. Michael Pitfield, a former Secretary to the Privy Council and Yves Fortier Q.C., a former Ambassador to the United Nations. Now shown to me and marked as Exhibit "T" to this my Affidavit is a true copy of a list of the class of 1957 and 1958 of the McGill Faculty of Law.
>
> 46. THAT I am advised by Samson's counsel and do verily believe that they have made enquiries and have been advised that Mr. Justice Teitelbaum was active in fundraising for the Conservative Party of Canada prior to his appointment to the Federal Court.

13 These allegations are only made by Acting Chief Victor Buffalo and, as he states, he obtained this information from "Samson's solicitors" who, as it was stated to me is Me James O'Reilly who, it appears from what he stated to me, is a friend of the Honourable Brian Mulroney knowing him since 1964.

14 I would first state that the allegation of whether I know the Honourable Brian Mulroney or any other of the persons mentioned in the above paragraphs is totally immaterial to the issue of a reasonable apprehension of bias. I was asked to disclose my relationship with the individuals

mentioned in paragraphs 44 and 45 of the affidavit and my involvement with fundraising for the Conservative Party of Canada prior to my appointment as this would suggest to Acting Chief Victor Buffalo, or at least to his counsel, a reasonable apprehension of bias. I believe that what plaintiffs are really attempting to say is since I know Brian Mulroney I must be recused in the same way Justice Campbell was reassigned because he knows Roy Louis, Cathy Louis and Wilson Okimaw. This is comparing apples and oranges. Roy and Cathy Louis and Wilson Okimaw are members of the Samson Band and Nation. The persons mentioned in paragraphs 44 and 45 of Victor Buffalo's affidavit have no interest in the outcome of these two cases. The Louis' certainly have a direct interest in the outcome of the case. Roy Louis is an active member of the Samson Indian Band and Nation and Cathy Louis is a close friend of Mr. Justice Campbell.

15 I stated that I was an "acquaintance" of the Honourable Brian Mulroney as my association with him was not on a social basis. The Honourable Warren Allmand, a former Liberal Minister of Indian Affairs and Northern Development, and G. Ian Watson attended Law School at McGill University with me and were classmates. I confirmed that I had heard of Donald J. Johnson and that I may have said hello to him on one or two occasions and that I never had the pleasure of meeting P. Michael Pitfield. I do know Yves Fortier Q.C.

16 After asking counsel for plaintiffs their definition of" fundraising", I indicated that I never raised funds for the Conservative Party of Canada. I added that it should be considered an honour to serve one's country in a political office and to know someone who has served his country as a Member of Parliament. In my opinion, this fact cannot give rise to a reasonable apprehension of bias.

17 As I have stated, the allegations found in paragraphs 44, 45 and 46 of Victor Buffalo's affidavit are, in addition to being irrelevant, totally meaningless for the purpose of the present application.

Issues

18 After a reading of the Notice of Motion and a reading of the affidavit evidence, together with the attached exhibits, I am satisfied that the following are the issues in the determination of whether or not a reasonable apprehension of bias can legally exist from the facts of this case.

> 1) The manner in which it was decided that Mr. Justice Campbell would not be the trial judge.
>
> 2) The manner of my appointment as trial judge.
>
> 3) Whether my past "words and actions" in the Cape Mudge, Campbell River Indian Band cases and in the *C.P. v. Matsqui* case gives rise to a reasonable apprehension of bias

4) Whether my past relationships mentioned by Acting Chief Victor Buffalo with certain specific individuals and with the Conservative Party of Canada is sufficient so as to conclude that a reasonable apprehension of bias exists.

5) The issue of procedure used for recusal.

6) A sixth issue arose at the hearing when counsel for the Ermineskin Indian Band and Nation et al suggested that a reasonable apprehension of bias arises from the mere fact that I heard and decided an application for my own recusal.

The Law

The Test for Reasonable apprehension of Bias

19 The genesis for the modern formulation of the test is contained in the dissenting judgment of de Grandpré J. in *Committee for Justice& Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at p. 394 [hereinafter *Committee for Justice*]:

> ... the apprehension of bias must be a reasonable one, held by reasonable and rightminded people 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."

20 There is some question about the degree of knowledge which this reasonable person possesses. In *Committee for Justice*, de Grandpré J. referred to an "informed person" at p. 394 as being the" reasonable" person.

21 An oft-quoted passage on the subject is by Lord Denning in *R. v. London Rent Assessment Panel Committee*, [1968] 3 All E.R. 304 (Eng. C.A.), at p. 310:

> ... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand (cited cases omitted). Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough (cited cases omitted). There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and

> confidence is destroyed when right-minded people go away thinking: "The judge was biased". (underlining is mine)

22 Although the situations where a judge should be disqualified necessarily depend on the level of generality one chooses, there are several situations which seem to crop up on a regular basis. In *Energy Probe v. Canada (Atomic Energy Control Board)* (1984), 15 D.L.R. (4th) 48 (Fed. C.A.), aff'g (1984), 8 D.L.R. (4th) 735 (Fed. T.D.), Marceau J. suggested at p. 61 that the following circumstances would *typically* disqualify a judge:

> ... kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested, predetermined mind as to the issue involved, etc.

23 Several cases have sounded a warning that a judge should not easily accept an application to recuse. Chief Justice McEachern made the following observation in *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada* (1992), 74 B.C.L.R. (2d) 283 (B.C. C.A.) at 287:

> A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to ensure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price.

24 On a similar note, the British Columbia Court of Appeal in *Middelkamp v. Fraser Valley Real Estate Board* (1993), 83 B.C.L.R. (2d) 257 (B.C. C.A.), stated the following at p. 261:

> As I believe the Chief Justice of this Court has said on more than one occasion, a trial is not a tea party. But bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism.... Bias does not equate with what might be found in the end to be an unsatisfactory trial. (underlining is mine)

25 Thus, as Hoyt J.A. stated in *Blanchard v. C.P.U., Local 263* (1991), 113 N.B.R. (2d) 344 (N.B. C.A.), a decision to disqualify should "only be exercised sparingly and in the most clear and exceptional cases" (at 351).

26 In cases where the test for bias is not satisfied, the court in *Mattson v. ALC Airlift Canada Inc.* (1993), 18 C.P.C. (3d) 310 (B.C. S.C.) noted that the judge will continue to sit on the trial to its conclusion despite unhappiness on the part of counsel or parties over the conduct of the trial.

27 As well, in the case of *R. v. S. (R.D.)* (September 26, 1997), Doc. 25063 (S.C.C.) (S.C.C.) at pages 20 and 21:

> **(iv) The Test for Finding a Reasonable Apprehension of Bias**
>
> [para 109] When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. Idziak, supra, at p. 660. It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See Newfoundland Telephone, supra, at p. 636.
>
> [para 110] It was in this context that Lord Hewart C.J. articulated the famous maxim: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259. The Crown suggested that this maxim provided a separate ground for review of Judge Sparks' decision, and implied that the threshold for appellate intervention is lower when reviewing a decision for" appearance of justice" than for "appearance of bias". This submission cannot be sustained. The Sussex Justices case involved an allegation of bias. The requirement that justice should be seen to be done simply means that the person alleging bias does not have to prove actual bias. The Crown can only succeed if Judge Sparks' reasons give rise to a reasonable apprehension of bias.
>
> [para 111] The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National energy Board*, [1978] 1 S.C.R. 369, at p. 394.
>
> > 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 ... [The] test is" what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See Bertram, supra, at pp. 54-55; Gushman, supra, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of

the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also Stark, supra, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.) (QL), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

[para 113] Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

Discussion

28 As I have stated, I see the present application as an application that I disqualify myself from hearing the trial of the above cases set to start sometime in the near future. As it was forecast to take anywhere from one to two years, or more, in Calgary, it was decided that a judge should be assigned to hear the trial. As a result, the Associate Chief Justice, as it is within his jurisdiction to do so, decided that Mr. Justice Campbell should be the assigned judge for the hearing.

1) The Assignment of Mr. Justice Campbell as Trial Judge

29 I do not believe it necessary for the purposes of this decision to recite in detail what steps were taken in the assignment of Mr. Justice Campbell as trial judge, nor how it was decided by the Associate Chief Justice (hereinafter ACJ) that Mr. Justice Campbell should not be the assigned trial judge.

30 To see what plaintiffs allege took place, one can read the affidavits of Chief Florence Buffalo and the written submissions of the plaintiffs for the present application.

31 After it was decided by the ACJ that Mr. Justice Campbell would no longer be the assigned trial judge, he informed plaintiffs' counsel of that decision by telephone. The ACJ is alleged to have commented, in the course of this conversation, that as a result of Mr. Justice Campbell knowing three persons who are or may be members of the plaintiff Samson Indian Band, he decided Mr. Justice Campbell should not sit as the trial judge. It is my understanding that the reassignment of Mr. Justice Campbell came about as a result of Mr. Justice Campbell taking the initiative in raising his relationship with three members of the Samson Indian Band and Nation, all of whom have a direct interest in the outcome of the case. Judges do not normally raise such an issue unless *they are concerned* that discovery of the relationship, after the commencement of the hearing, might raise a reasonable apprehension of bias. Mr. Justice Campbell raised the issue on *at least two*

occasions. This, I am satisfied, clearly shows his concern that his friendship with these individuals could raise a reasonable apprehension of bias.

32 It is alleged by plaintiffs' counsel that the ACJ stated he would not assign a newly appointed Aboriginal judge to hear an Aboriginal case as he was of the view that such a judge might find it uncomfortable hearing such a case.

33 As a result, the Samson Indian Band filed a complaint of discrimination against the ACJ with the Canadian Judicial Council and requested that the ACJ no longer assign the trial judge while the complaint with the Judicial Council was pending. It must be noted that *it is the Plaintiffs* who specifically asked that the ACJ no longer assign the trial judge.

34 The plaintiffs attempted to appeal the ACJ's" decision" to the Federal Court of Appeal. The Chief Justice issued a Direction stating that the issue of the ACJ deciding that Mr. Justice Campbell would no longer be the trial judge was not a" judgment" or "order" subject to appeal.

35 The entire matter was brought by the plaintiffs before the Supreme Court of Canada in an application for leave to appeal, for *certiorari* and remand, for a stay of execution or other relief and for abridging the legal delays. In the said application for leave, plaintiffs, in a most detailed application recite the entire factual situation of how and why the" decision" of the ACJ to "remove" Mr. Justice Campbell as trial judge was invalid and, I say, why they are now claiming that the process raises a reasonable apprehension of bias.

36 On June 26, 1997, the Supreme Court of Canada issued the following decision:

> The application for an expedited hearing of these applications for leave to appeal are granted.
>
> The applications for remand, for stay of execution, for *certiorari* and for an oral hearing of the applications for leave are dismissed.
>
> The applications for leave to appeal are dismissed.
>
> Les demandes sollicitant l'audition accélérée des demandes d'autorisation d'appel sont accordées.
>
> Les demandes de renvoi, de sursis d'exécution, de certiorari et d'audition des demandes d'autorisation d'appel sont rejetées.
>
> Les demandes d'autorisation d'appel sont rejetées.

37 It is obvious that the Supreme Court of Canada did not accept the submissions of the plaintiffs. What is of particular interest is that the Court refused to order a remand or a stay of execution of the ACJ's" decision" that Mr. Justice Campbell not be the trial judge.

38 As I have said, according to the affidavit evidence of the plaintiffs, they allege the process of the Federal Court Trial Division wherein it was decided that Mr. Justice Campbell no longer be the trial judge raises a reasonable apprehension of bias.

39 I, with respect, do not agree. Nor did the Supreme Court of Canada agree with this allegation. It is and always was within the jurisdiction of the ACJ to designate which judge is to be "the trial judge" in any particular case. I am satisfied that until a judge is seized with a case, the ACJ may decide who will hear any particular case.

40 As well, the entire issue of how it was decided that Mr. Justice Campbell should no longer be the trial judge is totally irrelevant to the issue of reasonable apprehension of bias on my part.

2) The Assignment of Justice Max M. Teitelbaum as Trial Judge

41 Plaintiffs allege that the manner of my assignment as trial judge is invalid and thus raises a reasonable apprehension of bias. Briefly stated, the plaintiffs submit that my assignment as trial judge is invalid because the procedure followed for my assignment is contrary to the provisions of the *Federal Court Act* and that since the Federal Court is a Statutory Court with no inherent jurisdiction, the" procedure" as stated in the Act must be followed to designate a trial judge. The submission is, according to the present Notice of Motion, that my "appointment" is of no force and effect and, *inter alia*, contrary to the *Federal Court Act*, R.S.C. 1985, c. F-7 as amended, section 3, subsections 6(3) and 15(2) as well as the *Charter of Rights and Freedoms* section 7 and the *Constitution Act* 1867 preamble and section 101".

42 The grounds, as it relates to the above, are found in grounds numbered, I believe, 1, 2, 3, 4 and 5.

43 I do not intend to discuss the issue of the *Charter of Rights and Freedoms* section 7 nor the *Constitution Act*. Neither the Charter nor the *Constitution Act* are applicable.

44 Section 15 of the *Federal Court Act* states:

> 15.
>
> (1) Subject to the Rules, any judge of the Trial Division may sit and act at any time and at any place in Canada for the transaction of the business of the Court or any part thereof and, when he so sits or acts, he constitutes the Court.
>
> (2) Subject to the Rules, all such arrangements as may be necessary or proper for the holding of courts, or otherwise for the transaction of business of the Trial Division, and the arrangements from time to time of judges to hold such courts or to transact such business, shall be made by the Associate Chief Justice.

> (3) The trial of any matter in the Trial Division may, by order of the Court, take place partly at one place and partly at another.

45 Particular reference is made to subsection 15(2) where it is stated that the arrangements for trials are to be made by the Associate Chief Justice. It does not say that the Associate Chief Justice must personally make these arrangements nor does it state that he is prevented from delegating his jurisdiction to make such arrangements. In matters of process, a "liberal" or "wide" interpretation must be given to subsection 15(2) of the *Federal Court Act*.

46 Plaintiffs' counsel then refers to subsection 6(3) of the *Federal Court Act*. Subsection 6(3) states:

> 6. (3) Where the office of Chief Justice or of Associate Chief Justice is vacant, or the Chief Justice or the Associate Chief Justice is absent from Canada or is for any reason unable or unwilling to act, the powers and duties of the Chief Justice or the Associate Chief Justice shall be exercised and performed by the senior judge who is in Canada and is able and willing to act.

47 This subsection is only resorted to when the office of the ACJ is vacant (not the case), when the ACJ is absent from Canada (not the case)," or is for any reason unable or unwilling to act" (not the case).

48 There is no suggestion that the ACJ's office was vacant nor that he was out of Canada. The suggestion is that the ACJ was unable and/or unwilling to act.

49 After plaintiffs had filed a complaint with the Canadian Judicial Council regarding the ACJ's comments, *plaintiffs* requested that the ACJ not take part in the selection of a trial judge. The ACJ, for his own reasons, agreed and decided to seek the advice of a committee of three "senior" judges. The committee of the three" senior" judges recommended that I be the judge selected to hear the present cases. In that the ACJ agreed not to take part in the selection of the judge, he accepted the recommendation of the committee that I be the judge assigned to hear the two cases.

50 I fail to understand the plaintiffs' submission that my assignment was done contrary to the *Federal Court Act*. I am satisfied there can be no reasonable apprehension of bias caused by the process used.

3) My past "words and actions" in two Court cases give rise to a reasonable apprehension of bias.

51 The two cases which plaintiffs claim give rise to a reasonable apprehension of bias are *Canadian Pacific Ltd. v. Matsqui Indian Band* (1996), 111 F.T.R. 161 (Fed. T.D.) and in *Wewayakum Indian Band v. Canada* and the case of the *Roberts v. R.* reported at (1995), 99 F.T.R. 1 (Fed. T.D.).

52 Both cases have been brought to the Federal Court of Appeal.

53 Grounds numbered 16 and 17 specifically refer to these two cases and why my words allegedly give a "reasonable person" a" reasonable" apprehension of bias.

54 It is of course obvious or, at least, it should be obvious to trained legal counsel that I am unable to respond as to the meaning of what I said in both judgments. What I say in those judgments are there to be read. It will be for the Court of Appeal to agree or disagree with my interpretation of various sections of the *Indian Act*, with regard to the issue of self-government, trust and fiduciary obligations, limitations of actions and any other issue raised in those two judgments.

55 Surely, counsel for the plaintiffs know that if I am wrong in what I state in those two judgments, the Court of Appeal will so state and that I am legally bound, in all future matters where the same issue is raised, to follow the judgment of the Court of Appeal or, for that matter, what the Supreme Court of Canada may say.

56 I believe it necessary to comment on the issue of solicitor-client costs awarded against the Wewayakai Indian Band. The reasons for my doing so are stated in the judgment before the Court of Appeal and the Court of Appeal will decide if I was correct in that judgment. I repeat, it is worthy to note that in the case of the *Wewayakum Indian Band v. Canada and the Wewayakai Indian Band*, I dismissed the claims of the Wewayakum against the Crown and the Wewayakai Indian Band *without* costs and that the cross-claim made by the Wewayakai against the Wewayakum Indian Band *without costs*. It appears that Mr. C. Allan Donovan or the plaintiffs fail to make mention of this fact.

57 I would also make an observation with respect to the" implied dependence of Indians as clinging to mother's apron, with the Crown impliedly being the mother". Again, this case, *Canadian Pacific Ltd. v. Matsqui Indian Band* is before the Court of Appeal and it will be for the members of the Court of Appeal to interpret my remarks. I would only state that it is plaintiffs themselves who refer to the *Indian Act* as being paternalistic.

58 With due respect, I fail to see how what I say as to the interpretation of the law can give rise to a reasonable apprehension of bias. If this were the case I would never be permitted to sit on a case involving an issue about which I had previously decided. This, of course, would also apply to every other judge in Canada who has made a decision on a particular issue.

59 There is much jurisprudence that states that it is not bias nor does it give rise to a reasonable apprehension of bias if a judge had previously made comments relating to an issue or interpreted the law as it relates to a particular issue.

60 In *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1992), 98 D.L.R. (4th) 762 (Ont. Div. Ct.), the employer's counsel requested that one of the judges on the panel disqualify himself because he was a former Labour Relations Board chairman who had decided a case which involved an issue similar to the one presently before the court. Counsel did not suggest that the judge had any interest in the present proceedings. The motion was dismissed because there was no requirement to disqualify the judge based merely on a prior position taken on some topic before being appointed to the judiciary. The court added that even if the judge had decided the issue as a judge, there still would not have been a reasonable apprehension of bias.

61 In *Canadian National Railway v. Canada (Human Rights Commission)* (1985), 64 N.R. 312 (Fed. C.A.), the Court of Appeal refused to remove MacGuigan J. from the three-judge panel merely because he had expressed his opinion, in connection with another case, on a point of law which arose in the case at bar.

62 Finally, the statement of the Supreme Court of Canada in *Morgentaler v. R.*, 2 October 1974, S.C.C. Motion No. 13504, reported (1974), 29 McGill L.J. 369 (S.C.C.) at 405] appears to have wide application:

> All members of this court, past and present, have, to a greater or lesser degree, before appointment to the Bench and to this court, expressed views on questions which have legal connotations, and this has never been a disqualifying consideration.

63 I take the above cases to say that a judge, in deciding issues put before him or her in another case and which issues may be similar or the same as the issues he or she is to try will not be recused on the basis of a reasonable apprehension of bias for having previously decided the issues.

4) My Past Relationships

64 I believe it is interesting to note that I am asked to disclose my relationship with various "political" individuals (ground number 2) as well as my relationship, since 1956, with members of the House of Commons or the Senate including all committees thereof, members of the Federal Government, employees of the Federal Government, persons on the staff of, or who acted as an advisor to any Prime Minister or any Minister of the Federal Government and persons working for or associated with the Federal Liberal or the Federal Conservative Party.

65 It appears to be plaintiffs' belief or, at least, it is the belief of plaintiffs' counsel, that knowing certain individuals involved in the governing of Canada, either as Prime Minister or as a Minister of the Crown or as a member of the House of Commons or of the Senate or of a committee thereof or of having been a member or fundraiser for a legal Federal political party gives rise to a reasonable apprehension of bias.

66 My first comment is that this submission, in the manner it is stated in the Notice of Motion is outrageous and is totally irrelevant to the issue of a reasonable apprehension of bias.

67 I did disclose my relationship to the persons mentioned in ground number 2. I did state that I have never been a fundraiser for the Federal Conservative Party. I also stated that it is not illegal to be a fundraiser nor, to the best of my knowledge, is being a fundraiser a bar to being appointed to a Superior Court in Canada. This, I believe, also applies to being an acquaintance or friend of a Prime Minister or Minister of Canada.

68 In addition, Martin L. Friedland in *A Place Apart: Judicial Independence and Accountability in Canada* in a report prepared for the Canadian Judicial Council, states, at page 233:

> There is, of course, nothing improper in appointing a person who had been involved in politics. Indeed, knowledge of the political process can be an advantage for a judge.

69 I see no merit to this submission made by plaintiffs.

5) The issue of Procedure used for Recusal

70 The plaintiffs allege that the procedure for recusal wherein the plaintiffs were told to make a formal application for recusal, to be heard in" open court" gives rise to a reasonable apprehension of bias as this procedure was different from the "procedure" used by the Crown in its request involving Mr. Justice Campbell.

71 I must state that I fail to see how the "present procedure" raises a reasonable apprehension of bias. The plaintiffs were told that if they had "concerns" about me and because they refused to disclose what the concerns were, they should make a formal application to the Court. The plaintiffs took two and one half days to make their submission. How it was decided that Mr. Justice Campbell no longer be the trial judge is totally immaterial to the issue of a reasonable apprehension of bias on my part. In addition, and as I have already said, with regard to Mr. Justice Campbell, it was Mr. Justice Campbell who raised the concern of his relationship with three persons who are members of the plaintiff band and nation and such disclosure by a judge usually constitutes an implied invitation to counsel to waive his or her concern. In this case, counsel for the Crown did not do so and expressed their concern by sending a letter, dated May 6, 1997, clearly detailing their concern..

72 This fact is very different from the concern expressed by plaintiffs' counsel about me. In fact, to the time that plaintiffs presented their application, the plaintiffs gave *no* reason for their concern. As a result, plaintiffs were asked to bring an application before the Court with supporting materials.

6) Apprehension of Bias arising from the fact that I am deciding the Reasonable Apprehension of Bias issue.

73 I believe I can do no better than to quote the following:

> **Oath of Office**
>
> I, Max Mortimer Teitelbaum, do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as a Judge of the Federal Court of Canada.
>
> So Help me God.
>
> **Serment d'Office**
>
> Je, Max Mortimer Teitelbaum, promets et jure solenellement et sincèrement d'exercer bien fidèlement, et au mieux de ma capacité et de mes connaissances, les pouvoirs et attributions qui me sont dévolus en ma qualité de Juge de la Cour fédérale du Canada.
>
> Ainsi Dieu me soit en Aide.

74 I swore to the above oath at Montreal, in the Province of Quebec, on the 28th day of November 1985. This is just more than 12 years of the date of the present hearing. I have, in the past 12 years, faithfully carried out the above responsibilities and trust. I intend to continue to do so.

75 I cannot conclude, after hearing the present application to disqualify myself, that my presiding over these two cases would be likely to raise in the mind of a reasonably informed person an apprehension of bias.

76 In the case of *Middelkamp v. Fraser Valley Real Estate Board* (June 10, 1993), Doc. Vancouver A881710 (B.C. S.C.), in the Trial Division, Boyd J. states:

> [para 24] Finally, Mr. Rankin has submitted that even if there are no grounds for disqualification I ought, nevertheless, to disqualify myself since it will now be impossible for me as the trial judge to hear the plaintiffs' case with fairness and impartiality. Mr. Rankin asks: "... could the reasonable observer expect the judge to remain impartial and independent while the person who uncovered this information is a litigant in a case before her?" This is what Mr. Cadman has called the Catch 22 argument.
>
> [25] I cannot accede to such an argument since to do so, in my view, would establish a very dangerous precedent in these courts. In effect, I would be inviting disgruntled, unhappy litigants or their counsel to make whatever allegations they wished, in support of an application for the judge to disqualify himself or herself. If the allegations failed to provide a proper foundation for a finding of bias or a reasonable apprehension of bias, the litigant could nevertheless take comfort in the knowledge that the mere making of the allegations would,

> by their very nature, taint the process and force the disqualification of the judge. This very danger was recognized by Chief Justice McEachern, C.J.B.C., in *G.W.L. Properties Limited v. W.R. Grace & Company of Canada Ltd.* (1992), 74 B.C.L.R. (2d) 283 (B.C.C.A.).

77 I agree with what Boyd J. states. I also take from this case that the judge against whom a disqualification application is made should hear the application for recusal. Counsel for the Ermineskin Band suggested I should not have heard the present application. He failed to submit any jurisprudence that suggests that a judge other than the one against whom the disqualification allegation is made should hear the application.

78 I have read all of the affidavit evidence filed. I have not commented on all of the exhibits filed as I believe it is not necessary to do so. I have also not commented on the issue raised by plaintiffs that Mr. Justice MacKay failed to follow Rule 491(11) of the Federal Court Rules and, as a result, I must disqualify myself.

> 491. (11) Other than those matters agreed upon or directed in a pre-trial conference, all matters discussed in the pre-trial conference are confidential and without prejudice to the parties.

79 The allegation, as I understand it, is that Mr. Justice MacKay informed me of matters discussed in pre-trial conferences which were confidential. I will only state that this is an incorrect allegation as is evident from a memo dated October 16, 1997 sent to Plaintiffs' counsel wherein he states "I conclude by noting that in my opinion I have communicated to Teitelbaum J. only information I consider necessary for his planning to assume his responsibilities as trial judge".

80 The application for my recusal (disqualification) is denied. I shall sit as trial judge for the trials in files T-2022-89 and T-1254-92 which have been joined for hearing.

Application dismissed.

End of Document

3

2006 FC 1473, 2006 CF 1473
Federal Court

Sanofi-Aventis Canada Inc. v. Novopharm Ltd.

2006 CarswellNat 4302, 2006 CarswellNat 5446, 2006 FC 1473, 2006 CF 1473, 153 A.C.W.S. (3d) 595, 306 F.T.R. 103 (Eng.), 54 C.P.R. (4th) 151

Sanofi-Aventis Canada Inc. and Sanofi-Aventis Deutschland GmbH, Applicants and Novopharm Limited and the Minister of Health, Respondents

R.T. Hughes J.

Heard: December 7, 2006
Judgment: December 8, 2006
Docket: T-1979-05

Counsel: Gunars A. Gaikis, J. Sheldon Hamilton, Mark G. Biernacki, for Applicants
Jonathan Stainsby, Mark Edward Davis, Neil Fineberg, for Respondent, Novapharm Limited
No one for Respondent, Minister of Health

Subject: Intellectual Property

***R.T. Hughes J.*:**

1 The Applicants have brought a motion within the context of this Notice of Compliance proceeding requesting that I recuse myself from hearing a forthcoming motion brought by the Respondent to dismiss these proceedings and from any other involvement in these proceedings. For the Reasons that follow, I have determined that I will not recuse myself.

2 These are Notice of Compliance (NOC) proceedings. In accordance with the *Patented Medicines (Notice of Compliance) Regulations*, such proceedings are to be made by way of application, to proceed in a summary fashion, and to be concluded within twenty-four (24) months from when they are instituted. This seemingly simple model has not proven successful in practice. The issues include those of patent validity and infringement which are complex issues, particularly in the field of drugs and medicines, requiring sophisticated expert evidence. The stakes are usually very high. An innovator drug company may find that a successful generic has entered the market eroding substantially the market position and profitability of the innovator. More than one generic may enter the market, the order in which they enter and the marketing strength of the generic may be critical. It is not unusual to find that millions of dollars may be at stake and that every single

day that a generic is prevented from entering the market can be critical to each of the innovator and the generic.

3 As a result, NOC proceedings in this Court are usually hotly contested, many procedural motions and issues arise, tactics and strategy abound. Both the innovator and the generic instigate and participate in such matters. So much is at stake. If, at the end of the day, the innovator is successful, the generic is prevented from marketing the product at issue. If the generic is successful, it may enter the market but be subject to possible patent infringement actions respecting the same or other patents. *Res judicata* does not apply in such actions so that the result of the NOC proceedings cannot be applied to the patent infringement action. The *Regulations* provide a further tool to the generic to sue the innovator for damages if it can be shown that the innovator, in some improper way, used the NOC proceedings to delay entry by the generic into the market.

4 Here we have a motion by the innovator, that I recuse myself on the basis of alleged reasonable apprehension of bias. One hesitates to, in effect, judge oneself, but that appears to be the process. The judge in question decides if it is appropriate that he or she be recused. The test for recusal is not in issue, it is that set out in the recent decision of the Supreme Court of Canada in *Roberts v. R.*, [2003] 2 S.C.R. 259 (S.C.C.) at paragraph 60 of the decision of the Court:

> 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in Committee for Justice and *Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias: [page289]
>
> ... 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. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

5 There is no question of actual bias, the issue is that of reasonable apprehension of bias. The Applicants have fairly stated their position in paragraphs 35 and 36 of their Memorandum:

> 35. In the present case, Sanofi-Aventis does not suggest that there is actual bias, but rather, suggests that there is a reasonable apprehension of bias. Certainly, the personal integrity of Justice Hughes is not at issue.
>
> 36. The question is whether, having regard to the totality of the circumstances, confidence in the integrity of the administration of justice would be undermined if Justice Hughes decides the present motion. The test is whether reasonable, right-minded and properly informed persons would think that Justice Hughes, whether consciously or unconsciously, would not decide the motion fairly.

6 At this stage, it is appropriate to review these proceedings and other proceedings.

7 Prior to the institution of these proceedings the Respondent, Novopharm, sent a letter, called a Notice of Allegation under the Regulations, stating that it intended to obtain permission to market a drug containing ramipril in Canada. Novopharm alleged that certain patents, which for brevity I will call the '089, the '948, the '549 and the '387 patents would not be infringed if Novopharm were to market its drug in Canada. Novopharm further alleged that two of these patents, the '549 and the '387 were, in addition, invalid. As a result, the Applicants instituted these proceedings stating that such allegations were not justified.

8 Sanofi-Aventis has also been engaged in other NOC proceedings in this Court respecting many of the same patents. In *Aventis Pharma Inc. v. Pharmascience Inc.*, 2006 FC 898 (F.C.), this Court held that Aventis (a predecessor of Sanofi-Aventis) had not proven that Pharmascience's allegation of non-infringement was not justified in respect of the '948 patent. In other words, Sanofi-Aventis failed to show infringement by the generic Pharmascience of the '948 patent. In *Aventis Pharma Inc. v. Apotex Inc.*, 2005 FC 1461 (F.C.), affirmed by the Federal Court of Appeal on November 2, 2006, 2006 FCA 357 (F.C.A.), it was held that Sanofi-Aventis had failed to show infringement by the generic Apotex of the '089 patent.

9 Waiting in the wings are two further NOC proceedings involving yet another generic Laboratoire Riva Inc. In these proceedings one of the issues is whether Sanofi-Aventis can prove whether Riva's allegation of non-infringement of a number of patents, among them the '089 and the '948 patents which were previously the subject of decisions of this Court respecting other generics, Pharmascience and Apotex is justified.

10 With respect to the two Riva proceedings, I acted as solicitor of record for a time for Riva and signed one of the Notices of Allegation. I took no active part in respect of the examinations of Sanofi-Aventis' witnesses. A year and a half has passed since I was sworn in as a judge of this Court.

11 The common thread, if any, between Riva and this current Novopharm proceeding, is the same as that in the decided cases of this Court respecting Pharmascience and Apotex namely, has the allegation of the particular generic in question that it would not infringe the '089 or '948 patent been shown not to be justified?

12 It is important to note that there is, in respect of the forthcoming motion, which is among the matters from which I am asked to recuse myself, no issue as to validity of any patent. Patent validity can, in some circumstances, be *in rem* proceedings. This however, is only in an ordinary patent action where the Court may in fact impeach a patent or some of its claims in a judgment that is *in rem* and effective against the patent itself and not just the parties.

13 Infringement on the other hand requires a factual examination as to what the alleged infringer does or says it will do. This is a determination of fact to be made upon the evidence as determined by the Court in each case. That determination of fact is then applied to the claims of the patent at issue, as construed by the Court, to determine if an allegation of non-infringement is justified.

14 The question of infringement, therefore, is a mixed question of fact (what the alleged infringer does or will do) and the law (construction of the claim) see *Whirlpool Corp. v. Camco Inc.*, [2000] 2 S.C.R. 1067 (S.C.C.) at para.67.

15 The claim at issue of the '089 Patent has previously been considered by the Federal Court in the *Apotex* case, *supra*, at paragraph 25 of the reasons as being a claim for use of ramipril in treating Hypertrophy. That construction was undisputed. The judgment was affirmed on appeal.

16 In *Pharmascience*, *supra*, the Federal Court has previously construed the '948 Patent at paragraph 3 of the Reasons as the use of ramipril in combination with a calcium antagonist to prevent and treat pneumonia. Again this construction was undisputed.

17 I have read the Memorandum of Argument filed by Sanofi-Aventis in respect of the forthcoming motion to dismiss and note at paragraph 23 that the construction of the claims of the '089 and '948 Patents urged there is not inconsistent with the finding of this Court, in those prior *Apotex* and *Pharmascience* decisions. I also note that Sanofi-Aventis in that Memorandum, argues, in paragraphs such as 60 and 92, that findings as to infringement are "fact-intensive" and that each case is to be considered separately.

18 Thus the findings that I will be asked to make in the present proceeding, particularly on the forthcoming motion, to the extent that there would be any commonality with Riva, would be fact intensive findings unique to each circumstance for each generic.

19 While Courts have often been circumspect when issues as to possible bias arise and have as a matter of expediency, assigned a different Judge to hear a matter when even the merest suggestion as to apprehension of bias arise, that is a matter of expediency only and does not establish jurisprudential precedent. In this case, the Applicants' only raised the suggestion of a bias issue by letter sent to the Court in the middle of the afternoon of the day before several motions were due to be heard by me, having been set down for hearing several weeks previously.

20 Turning to the jurisprudence, the *Arsenault-Cameron v. Prince Edward Island* case in the Supreme Court of Canada, reported at [1999] 3 S.C.R. 851 (S.C.C.) is instructive. The court states at paragraph 2 that:

> The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood of bias must be demonstrated.

21 In *Samson Indian Nation & Band v. Canada* (1997), [1998] 3 F.C. 3 (Fed. T.D.), Justice Teitelbaum of this Court at paragraph 73 to 75 reminds the reader as to the solemnity of the judicial oath and the impartiality that it brings with it.

22 In *Wewaykum*, *supra*, the Supreme Court at paragraph 59 of its decision invokes one of its earlier decisions in *R. v. Bertram* [1989 CarswellOnt 1511 (Ont. H.C.)] stating that the law should not carelessly evoke the possibility of bias in a Judge. As set out earlier in these Reasons in quoting from paragraph 60 of *Wewaykum*, there must be a "reasonable" apprehension of bias held by "reasonable and right minded persons." One does not view such matters through the mind of a cynical, capricious, excessively suspicious, paranoid or perfectionist person as MacKinnon ACJO stated at page 679 of *Currie v. Ontario (Niagara Escarpment Commission)* (1984), 14 D.L.R. (4th) 651 (Ont. C.A.).

23 Here the position of Sanofi-Aventis as to the alleged "reasonable" apprehension of bias is that somehow I would make findings in this case on the facts and in law that might benefit a former client at the time when I was practicing law, which former client has pending cases involving two of the same patents. As I have already pointed out, factual findings as to infringement are case specific, and there is no controversy as to construction of the claim. Such allegations are more like those recited by MacKinnon ACJO than those of a reasonable person.

24 Judges should be allowed to do their job free from unreasonable allegations of bias. They have taken an oath to execute their powers and trusts duly and faithfully. Lawyers practicing before the Courts have their own duties to their client and the Court. Lawyers should be encouraged, at the appropriate time, to put that career behind them and assume new duties as a Judge serving the public duly and faithfully. As the Supreme Court stated in *Arsenault-Cameron*, *supra* at paragraph 4 in referring to a decision of the Constitutional Court of South Africa: *"No recusal application could be founded on a relationship of advocate unless the advocacy was regarding the case to be heard"*.

25 The motion for recusal is dismissed with costs.

Order

FOR THE REASONS ABOVE:

1. The motion is dismissed; and

2. The Respondent is entitled to its costs of the motion.

End of Document

Federal Court | Cour fédérale

CANADA

Date: 20081113

Docket: T-161-07
Docket: T-1161-07

Ottawa, Ontario, November 13, 2008

PRESENT: The Honourable Madam Justice Snider

Docket T-161-07

BETWEEN:

SANOFI-AVENTIS CANADA INC.,
SANOFI-AVENTIS DEUTSCHLAND GmbH and
SCHERING CORPORATION

Plaintiffs

and

APOTEX INC.

Defendant

AND BETWEEN:

APOTEX INC.

Plaintiff by Counterclaim

and

SANOFI-AVENTIS CANADA INC. and
SCHERING CORPORATION
SANOFI-AVENTIS DEUTSCHLAND GmbH and
RATIOPHARM INC.

Defendants by Counterclaim

Docket: T-1161-07

BETWEEN:

SANOFI-AVENTIS CANADA INC.,
SCHERING CORPORATION and
SANOFI-AVENTIS DEUTSCHLAND GmbH

Plaintiffs

and

NOVOPHARM LIMITED

Defendant

AND BETWEEN:

NOVOPHARM LIMITED

Plaintiff by Counterclaim

and

SANOFI-AVENTIS CANADA INC.,
SCHERING CORPORATION and
SANOFI-AVENTIS DEUTSCHLAND GmbH

Defendants by Counterclaim

ORDER

UPON letter, dated September 26, 2008, and further letter, dated October 1, 2008, wherein Apotex Inc. (Apotex) requests that Snider J. recuse herself as trial judge in the trial of Court File No. T-161-07;

AND UPON letter, dated September 29, 2008, wherein Novopharm Limited (Novopharm) requests that the Court exercise its discretion and appoint another trial judge to hear the trial in Court File No. T-1161-08, which trial is related to Court File No. T-161-07;

AND UPON receipt of letters dated October 3, 2008, wherein Sanofi-Aventis Canada Inc. and Sanofi Aventis Deutschland (collectively, Sanofi) and Schering Corporation (Schering) oppose the requests of Apotex and Novopharm;

AND UPON Directions of this Court dated October 24, 2008 directing that the requests of Apotex and Novopharm be deemed to be motions in writing and giving the parties an opportunity to provide further written submissions;

AND UPON further submissions, dated November 3, 2008, from Apotex;

AND UPON careful consideration of all of the written submissions;

AND UPON determining that the motion should be dismissed:

In its motion, Apotex asserts that I should be disqualified from presiding at the trial of the action in Court File No. T-161-07. The basis of such disqualification is a reasonable apprehension of bias (and not actual bias). As expressed in Apotex's further submission:

> Apotex's request is predicated on the concern that, given the similarities between the within proceeding and some of the issues raised in Court File Nos. T-482-03 and T-1548-06, there is a reasonable apprehension that a reasonable observer would come to the view that Madam Justice Snider may be, consciously or subconsciously, influenced or at least informed by the evidence previously heard, impressions previously formed, arguments previously advanced and findings previously made in connection with the two proceedings referred to above.

Apotex's motion arises from the fact that I have previously adjudged two matters with similarities to the proceedings now before the Court.

The first (Court File No. T-482-03) was a proceeding under the *Patented Medicines (Notice of Compliance) Regulations* involving the same drug (ramipril). The decision in that case is reported as *Aventis Pharma Inc. et al. v. Pharmascience Inc. et al.*, 2005 FC 340, 38 C.P.R. (4th) 441. The Applicants in the case were predecessors to one of the Plaintiffs in the proceedings now in issue. Apotex acknowledges that, since T-482-03 did not involve Apotex as a party and was a proceeding under the *PM (NOC) Regulations*, "the circumstances did not warrant making a request for recusal on this basis alone".

The second case referred to by Apotex is Court File No. T-1548-06, which resulted in the decision cited as *Laboratoires Servier v. Apotex Inc.*, 2008 FC 825, 67 CPR (4th) 241. The drug involved in this patent litigation was perindopril, a drug that is included, along with ramipril, in a large class of drugs described as angiotensin converting enzyme (ACE) inhibitors. Apotex was the defendant and plaintiff by counterclaim in that proceeding. While the litigation involved a different patent, some of the issues raised are similar to those in these proceedings and the patent now before the Court was involved in some of those issues. Apotex, in particular, submits that the findings of this Court on the question of obviousness raise an apprehension of bias.

In both previous cases, similar issues were raised. While I have not seen the list of witnesses for the trials of T-161-07 or T-1161-07, I expect that some of the experts may be the same as were

presented, either by affidavit (Court File No. T 482-03) or in person (Court File No. T-1548-06), in the previous proceedings.

As noted by the Supreme Court in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at para. 60, in Canadian law, the criterion for disqualification of a judge for a reasonable apprehension of bias is as was described by Justice de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394:

> ... 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. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

In assessing Apotex's motion against this standard, I observe that Apotex's "reasonable observer" is not necessarily the informed person set out in the standard established in Canadian law. The question is not whether the complaining party would consider that I could not decide their case fairly. Rather, the motion can only succeed if it is established that reasonable, right-minded and properly informed persons would think that I would be consciously or unconsciously influenced in an inappropriate manner by my participation as judge in the two earlier proceedings (*Wewaykum*, above, at para. 73).

In the context of this motion, the informed person would note that Snider J., in the due course of her judicial duties, has expressed conclusions as to the effect of the evidence before her in each of Court Files Nos. T-482-03 and T-1548-06 and that certain of the issues and evidence in

those proceedings is likely to be the same in Court Files No. T-161-07 and T-1161-07. The informed person would be familiar with the strong presumption of judicial impartiality. The informed person would be aware that judges are frequently called upon to apply the same legal principles in different cases. The informed person would know that a judge must reach his or her decision based on the evidence before the Court in that case, and not on the basis of evidence that is not before the Court. The informed person would recognize that, in pharmaceutical litigation, the Court frequently encounters cases involving the same parties, the same witnesses, the same or related drugs and the same grounds of infringement or invalidity. In light of this knowledge, the informed person, in my view, would conclude that the judge in these proceedings would hear and adjudge the evidence and arguments of the parties with a fresh mind and that the judge would be no more influenced by the decisions in Court Files Nos. T-482-03 or T-1548-06 than by any other decisions of the Federal Court (or any other Court).

Apotex points out that it is raising an assertion of apprehension of bias before the trial "with a view to avoiding a situation where judicial conduct could even be subject to such scrutiny". In such situations, Apotex asserts, "the Courts do not cast as high an onus on the requester". I have seen no authority for a "lower" or different standard at this stage of the proceeding. I appreciate the fact that Apotex has chosen to raise this issue prior to trial with a stated objective of avoiding scrutiny of judicial conduct after the trial. However, this does not, in my view, change the test or standard to be applied.

Apotex refers to instances where judges of our Court have removed themselves from proceedings. Those cases are simply not relevant to this motion. In any event, the reassignment of a

case to a different judge, where a suggestion as to apprehension of bias is raised, "does not establish jurisprudential precedent" (*Sanofi-Aventis Canada Inc. v. Novopharm Ltd.*, 2006 FC 1473, 54 C.P.R. (4th) 151 at para.19).

Novopharm's submissions on this motion consisted of a one-page letter, in which it raises no different allegations or arguments to those that I have considered.

In sum, having reviewed the submissions of all parties, I conclude that my disqualification on the basis of a reasonable apprehension of bias is not warranted. Stated in terms of the standard applied by the Supreme Court in *Wewaykum*, above, I am not persuaded that reasonable, right-minded and properly informed persons would think that I would be consciously or unconsciously influenced in an inappropriate manner by my participation as judge in the two earlier proceedings. Both motions will be dismissed, without costs.

NOW THEREFORE THIS COURT ORDERS that:

1. The motions of Apotex and Novopharm are dismissed, without costs.

"Judith A. Snider"
Judge

4

2008 CAF 394, 2008 FCA 394
Federal Court of Appeal

Sanofi-Aventis Canada Inc. v. Apotex Inc.

2008 CarswellNat 4503, 2008 CarswellNat 5900, 2008 CAF 394, 2008 FCA 394, [2008] F.C.J. No. 1692, 174 A.C.W.S. (3d) 711

Apotex Inc., Appellant (Defendant) and Sanofi-Aventis Canada Inc. and Sanofi-Aventis GmbH Schering Corporation, Respondent (Plaintiffs)

Apotex Inc., Appellant (Plaintiff by Counterclaim and Sanofi-Aventis Canada Inc., Schering Corporation, Sanofi-Aventis Deutschland GmbH And Ratiopharm Inc., Respondents

John M. Evans J.A., Ryer J.A., Sexton J.A.

Heard: December 10, 2008
Judgment: December 10, 2008
Docket: A-576-08

Counsel: Harry Radomski, Nando DeLuca, for Appellant / Applicant
Sheldon Hamilton, Gunars Gaikis, for Respondent, Sanofi
Marc Richard, for Respondent, Schering

Subject: Intellectual Property; Civil Practice and Procedure

APPEAL by defendant of dismissal of motion requesting that judge recuse herself.

***J.M. Evans J.A.*:**

1 We are not persuaded that Justice Snider made any error warranting the intervention of this Court when, on November 15, 2008, she denied a motion by Apotex Inc. requesting that she recuse herself from presiding at the trial of Court File No. T-161-07 [2007 CarswellNat 2883 (F.C.)]. This is an action by the respondents to this motion for the infringement of Canadian Letters Patent No. 1,341,206 ("'206 Patent") by Apotex, which is defending the action on the ground that the patent is invalid for several reasons, including obviousness.

2 In particular, we find no inappropriate predisposition on the part of Justice Snider with respect to the issues in dispute in T-161-07 on the basis of the fact that she was the Judge in Court File

Nos. T-482-03 and T-1548-06, even though the issues involved in these three cases may overlap to a degree.

3 Court File No. T-482-03 arose under the *Patented Medicines (Notice of Compliance) Regulations* ("PMNOC Regulations"). In that proceeding, Justice Snider held that a Notice of Allegation alleging that the '206 Patent, which is at issue in T-161-07, was invalid was not justified: *Aventis Pharma Inc. v. Pharmascience Inc.* (2005), 38 C.P.R. (4th) 441 (F.C.), affirmed (2006), 53 C.P.R. (4th) 453 (F.C.A.), leave to appeal to the Supreme Court of Canada denied, (2007) (S.C.C.). However, because of their summary nature, PMNOC proceedings are decided on an inevitably more limited evidential base than a trial.

4 Court File No. T-1548-06 was an infringement action in which Apotex was found to have infringed Canadian Letters Patent No. 1,341,196: *Laboratoires Servier v. Apotex Inc.* (2008), 67 C.P.R. (4th) 241 (F.C.) ("*Servier*"). The validity of the '206 Patent was only tangential to the issues in that case.

5 However, in argument before us Apotex relied heavily on a sentence in paragraph 260 of Justice Snider's reasons in *Servier* (which total 519 paragraphs in all) as evidence of an improper predisposition, where she said of a witness, Dr Elizabeth Smith, that her "inventiveness and ingenuity is unquestioned". However, this comment is not a finding of credibility of Dr Smith, who is likely to be a witness at the T-161-07 trial. Nor is it so sufficiently clear and definitive as to give rise to a reasonable apprehension that Justice Snider would not fairly judge whether the '206 Patent is invalid on the ground of obviousness on the basis of whatever evidence may be led at the T-161-07 trial. Indeed, counsel for Apotex conceded that the inventiveness and ingenuity of Dr Smith were indeed not questioned in T-1548-06.

6 There is a strong presumption of judicial impartiality: *Roberts v. R.*, [2003] 2 S.C.R. 259 (S.C.C.) at para. 59 ("*Wewaykum*"). This is particularly difficult to rebut when an allegation of a reasonable apprehension of bias is based on a judge's previous encounter with a party, a witness or an issue in his or her judicial capacity. We are not satisfied that Apotex has provided the "serious" or "substantial" grounds (*Wewaykum* at para. 76) necessary to rebut the presumption here.

7 For these reasons, the appeal will be dismissed with costs.

Appeal dismissed.

DBDC SPADINA LTD., et al Applicants	NORMA WALTON, et al Respondents	Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

Responding Book of Authorities of Schonfeld Inc.

(Respondents' Motion for Recusal Returnable March 10, 2016)

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