THE PERCEPTION OF JUSTICE IN CANADIAN ABORIGINAL AND TREATY RIGHTS JURISPRUDENCE

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"... [J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done."

-Lord Hewart C.J. in *The King v. Sussex Justices*, [1924] 1 K.B. 256 at 259.

"Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"

-Lord Denning M.R. in *Metropolitan Properties Co. v. Lennon*, [1969] 1 Q.B. 577 at 599 (C.A.).

I. INTRODUCTION

The importance of maintaining public confidence in the administration of justice is a fundamental requirement for the application of law in democratic societies. One's perception of justice may be properly described as intangible; paradoxically, one only becomes aware of it when it is conspicuously absent. In order to maintain the confidence of the public and potential litigants, it is necessary to facilitate not only the achievement of justice, but also the perception of justice. As catalysts in the administration of justice, judges are foremost in the public's eye; consequently, their actions are key to maintaining the public's perception of justice being done. As the American jurist Learned Hand emphasized in *Brown v. Walter*, "Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge."[1]

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[1] 62 F.2d 798 at 800 (2d. Cir. 1933).

Judicial actions that have the potential to shake the public's confidence in the administration of justice are difficult to overcome. In the Aboriginal law context, two fairly recent events – a media interview by Justice Michel Bastarache in January, 2001[2] and Justice Ian Binnie's involvement in the case of *Wewaykum Indian Band v. Canada* ("*Wewaykum No. 1*")[3] prior to his appointment to the bench – have raised the spectre of conflict of interest and have brought into question the perception of justice in Canadian Aboriginal and treaty rights jurisprudence. While findings have been made with respect to these events that have exonerated the judges of any wrongful or improper conduct,[4] their actions do bring into question the perception of Aboriginal peoples' ability to receive fair treatment when placing their disputes before Canadian courts. The perception created by these actions has a chilling effect on Aboriginal peoples' ability and/or willingness to use litigation as a means of resolving their claims. This effect is compounded by the fact that any negative impact on Aboriginal peoples' use of litigation also affects their ability to negotiate the resolution of their claims.[5] The use of litigation by Aboriginal peoples is tainted by the perception that the deck may be stacked against their interests. Occurrences such as those involving Justices Bastarache and Binnie buttress this perception.[6]

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[2] Cristin Schmitz, "SCC wrong forum for native land claims: Bastarache" *Lawyers Weekly* (19 January 2001), 20 [Schmitz, "Wrong Forum"]. See also Cristin Schmitz, "Bastarache explains dissents in one-third of SCC decisions" *Lawyers Weekly* (19 January 2001) 1, 7 [Schmitz, "Dissents"]. Excerpts were reproduced in general circulation newspapers, including the *National Post* and *Ottawa Citizen*. While Justice Bastarache also commented on a number of criminal law cases and issues, those will not be addressed in this paper.

[3] [2002] 4 S.C.R. 245, 2002 SCC 79 ["*Wewaykum No. 1*"].

[4] See Letter from Chief Justice R.J. Scott, Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council, to Hon. M. Bastarache, (March 15, 2001), online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/english/news_releases/2001_03_16.htm> (last accessed July 15, 2003) ["Letter from Chief Justice R.J. Scott"] and *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45 ["*Wewaykum No. 2*"].

[5] In Leonard I. Rotman, "'Let Us Face It, We Are All Here to Stay' ... But Do We Negotiate or Litigate?" in K. Wilkins, ed., *TITLE TO BE DETERMINED*, (Saskatoon: Purich, 2004) [Rotman, "Let Us Face It"], I suggest that, while negotiation and litigation have traditionally been viewed as alternative processes, the history of Canadian Aboriginal and treaty rights jurisprudence illustrates how Aboriginal and treaty rights litigation begets negotiation and that negotiation pertaining to such matters becomes meaningful and effective only with the concomitant presence, or threat, of litigation.

[6] This paper is not intended to be an indictment of either Justices Bastarache or Binnie; rather, it attempts to demonstrate how actions such as theirs may have profound effects on the perception of the manner in which Aboriginal and treaty rights disputes are resolved in Canadian courts.

This paper highlights the actions of Justices Bastarache and Binnie and the effects of their actions on public perceptions of the Supreme Court of Canada's ability to dispassionately consider Aboriginal and treaty rights claims.

II. JUSTICE BASTARACHE'S 2001 NEWSPAPER INTERVIEW

In a newspaper interview printed in early 2001,[7] Justice Bastarache made controversial statements about the treatment of Aboriginal and treaty rights claims by the Supreme Court of Canada. His commentary included an overarching concern about addressing such matters through litigation. In his words: "I think the [Supreme] court is not the right forum for determining how the native rights will blend in with other rights of citizens in the country, and with citizenship and all of those other issues." Instead, he expressed the desire that "most of these things could be determined through negotiation, ... [because] I don't really believe the court is going to be able to be the final arbitrator in that area."[8]

Specifically, Justice Bastarache expressed his disagreement with the majority decision in *Marshall No. 1*[9] and the public's reaction to it: "The first reaction of the public, especially in the Maritimes, is that the court was very result-oriented and was inventing rights that weren't even in the treaties that were brought before the court in that case." He added that "the court was maybe seen as being unduly favourable to the native position in all cases, and that it sort of has an agenda for extending these [Aboriginal] rights, and that it has no concern for the rights of others."[10]

Speaking more generally, Justice Bastarache said that courts do not have an unlimited power to determine Canadian social policy. As he opined, "legal principle is distinct from legal policy, and that policy is for Parliament and principle is for the courts."[11] Elaborating upon this

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[7] *Supra* note 2.
[8] Schmitz, "Wrong Forum", *supra* note 2.
[9] *R. v. Marshall* (1999), 177 D.L.R. (4th) 513 (S.C.C.).
[10] Schmitz, "Wrong Forum", *supra* note 2.
[11] Schmitz, "Dissents", *supra* note 2.

point, he stressed that the Supreme Court "has to be seen to be entirely fair in its determination of legal issues where the social consequences and economic concerns are very important."[13]

As a result of Justice Bastarache's statements, the Atlantic Policy Congress of First Nations Chiefs and the Ontario Criminal Lawyers Association each filed complaints against him to the Judicial Conduct Committee ("JCC") of the Canadian Judicial Council ("CJC"). The JCC concluded that there was no basis to mount a more formal investigation into Justice Bastarache's actions. As Chief Justice Richard J. Scott of Manitoba, the chairperson of the JCC, indicated in a letter to Justice Bastarache dated March 15, 2001:

> In my opinion, no Panel could conclude that your comments so profoundly affect public confidence in your impartiality as to warrant the consideration of a recommendation of your removal from office. Accordingly, no Panel could conclude, pursuant to ss. 55(1) of the Council by-laws, that an investigation pursuant to ss. 63(2) of the *Judges Act* is warranted, and this complaint file has accordingly been closed.[14]

Chief Justice Scott further stated that Justice Bastarache's comments were "made honestly and in good faith to encourage a better understanding of the differences in judicial approach which gave rise to divisions of opinion in the Court" and "not to proselytize or act as a public advocate for the views which you expressed, but only to explain why you hold them."[15]

Although the Chief Justice stated that Justice Bastarache's motives were "laudable," he did find it "clearly preferable for judges to exercise restraint when speaking publicly." Along these same lines, he added that it "is a well-established and desirable practice for judges in Canada to avoid specific discussion of cases decided by their courts and, particularly, issues which are likely to come before their courts in the future."[16]

Justice Bastarache's suggestion that courts must exercise particular restraint when dealing with policy matters is rather ironic in light of the above statements. If he was truly concerned about judges straying too far into the realm of public policy, why would he speak out publicly –

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[13] Schmitz, "Wrong Forum", *supra* note 2.
[14] "Letter from Chief Justice R.J. Scott", *supra* note 4.
[15] *Ibid.*
[16] *Ibid.*

presumably in an attempt to influence public opinion – while at the same time openly pressuring his colleagues at the Supreme Court, as he put it, to "come back on some positions that were taken in the past"?[17] Justice Bastarache's comment that the Supreme Court must be seen to be fair in its determination of legal issues where social consequences and economic concerns are very important rests rather uneasily alongside his statement that *Marshall No. 1*[18] and a host of other decisions were incorrectly decided. Consequently, it is difficult to see how he or the court of which he is a member could be perceived to be objective or fair to an Aboriginal litigant after such a public airing of his personal beliefs. Lord Hewart C.J.'s aphorism in *The King v. Sussex Justices*, illustrated above, succinctly illustrates the importance of appearances in this regard.

Insofar as Justice Bastarache is an active participant in all aspects of the Supreme Court's investigatory and decision-making functions, his comments potentially taint the public's perception of the Court's objectivity. The fact that Justice Bastarache is only one of a number of judges sitting on a panel does not diminish the impact of his presence or the possibility that he may ask questions or engage in other actions that might influence his fellow judges' perception of a case.[20] Further, any discussion of the merits of the case among the judges after hearing oral arguments provides additional opportunities for Justice Bastarache to influence the other judges sitting on the matter. Whether or not he *would* seek to influence is ultimately unimportant to the perception of bias; the fact that he *possesses the ability to do so* is what is paramount. This factor alone may provide a significant disincentive for Aboriginal peoples to bring their claims before Canadian courts, which will also affect their ability to negotiate these same types of issues.[21]

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[17] Schmitz, "Dissents", *supra* note 2.

[18] *Supra* note 9.

[20] *Cf. Wewaykum No. 2*, *supra* note at paras. 92-3, in particular the following statement at para. 93:

> ... 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.

While there is opportunity for each member of the Supreme Court to express his or her opinions independently, the collegial nature of the process, emphasized by the Court, *ibid.* at para. 56, enhances the ability of one judge to influence the others.

[21] See Rotman, "Let Us Face It", *supra* note 5.

In his commentary entitled "Unexpected words from a Supreme," columnist Claire Hoy applauded Justice Bastarache's willingness to speak his mind on judicial activism.[22] According to Hoy, judges who decide in favour of broad and flexible interpretations of rights, recognize the importance of public policy in judicial decision-making, and view one of the *Charter*'s many functions as a check on government legislative discretion in their judgments are bad, but judges who publicly decry such actions extra-judicially and criticise decisions made by their colleagues in matters where they did not hear argument are good. Whatever one's views on the substance of these matters may be, such criticism does not distinguish between principled judicial decisions with which critics may simply disagree,[23] and judgments that are devoid of appropriate reasoning or authority. Unfortunately, Hoy is not the only journalist to make such unapologetic statements.

In an editorial written shortly after the release of *Marshall No. 2*,[24] the *National Post* blamed court clerks, their radical professors, and the dreaded "public policy" as the prime culprits in the undemocratic transformation of the former majesty of the law into little more than an unappealing goo.[25] Indeed, public policy has long been regarded as public enemy number one by those who favour a restrictive approach to law. Blaming court clerks, described by the *Post* as "recently graduated, twentysomething law students weaned on an ideological soup of radical feminism, multiculturalism and moral relativism,"[26] is really stretching things. Does anyone truly believe that judges are incapable of forming decisions that are not rooted in black letter law unless they have fallen prey to their manipulative clerks? Legal academics similarly possess the ability to influence judges via their writings – and, indeed, influenced judges and their clerks while they were captive law students – but are judges obliged to consider, much less accede to, their views?

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[22] Claire Hoy, "Unexpected words from a Supreme" *Law Times* (22 January 2001) 7.

[23] As Allan Hutchinson has appropriately said, "If you look a little more closely at those occasions on which the critics raise the spectre of activism and those on which they do not, you will see the difference is a blunt ideological one. Those decisions that do not fit their political agenda are condemned as activist and those that do are defended as appropriate.": Allan Hutchinson, "Guess what, all judges are activists," *Globe & Mail* (9 January 2003) A13 [Hutchinson, "Guess what ..."].

[24] *R. v. Marshall* (1999), 179 D.L.R. (4th) 193 (S.C.C.).

[25] "Supremes Retreat" *National Post* (19 November 1999) A15.

[26] *Ibid.*

Regardless of the actual target of this form of criticism, it is extraordinary to see extensive criticism of certain members of the Supreme Court as judicial activists – or judges gone wrong – for their reasons for judgment in reported cases while some applaud Justice Bastarache for making comments in the most inappropriate of ways. Does this criticism mean that only liberal-minded judges are activist, or may their more conservative colleagues also qualify for the title? Does being a judicial "activist" entail acting politically as opposed to judicially? More pointedly, is it truly possible to separate the two?

As Allan Hutchinson indicated in an editorial written around the time of Justice Bastarache's comments, "[m]indful that all decisions have an inescapable political dimension, what it is that the courts are being active about is the key. It is no more or less political to maintain the status quo than it is to subvert it; conservatism is as ideological as progressivism."[27] At least two other points come to mind: is being an activist judge necessarily a bad thing?[28] Alternatively, does being an "activist" judge make one good, bad, misguided, enlightened, or, simply, a judge?

The comments made by Justice Bastarache are not the first to question the appropriate role of judges and certainly will not be the last. Debates over the role of judges have long been heard in the halls of law schools, faculty lounges, law firm corridors, and in barristers' dressing rooms. Indeed, a judgment that exists at the foundation of modern Canadian constitutional thought, *Edwards v. A.-G. Canada*[29] (also known as the "Persons Case") evoked considerable criticism at the time for the perceived activism of Viscount Sankey's judgment. In a commentary published in the *Canadian Bar Review* in 1937, W.P.M. Kennedy stated that Viscount Sankey's organic theory of the Act, which he described as a "living tree,"[30] was an inappropriate use of

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[27] Allan Hutchinson, "Politics and justice do mix" *Globe & Mail* (17 January 2001) A15. See also Hutchinson, "Guess what ...," *supra* note 23: "While exhortations to 'stick to the law' are seductive, the fact is that, whether we like it or not, judges cannot avoid making political choices. The line that they are expected to tread is so thin as to be non-existent."

[28] Note the comments by Hutchinson, "Guess what ...," *supra* note 23 : "Activism sounds as if it is something positive – healthy, vital and purposeful. But, when it's used in connection with courts, many hear it only as having disturbing negative resonances – uppity, illegitimate and uncontrolled. For them, courts that do the least are the best."

[29] [1930] A.C. 124 (P.C.).

[30] Specifically, Viscount Sankey said, *ibid.* at 136, that "the B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits."

judicial power.[31] He argued that it was not the function of a judge to change the *British North America Act, 1867*, a mere statute,[32] to bring it into accord with modern demands.[33] This retrospective on the Persons Case demonstrates that today's tired old arguments[34] may well have been yesterday's powder keg. Perhaps the same fate will befall the so-called activism surrounding contemporary Aboriginal and treaty rights judgments in the future.

III. JUSTICE BINNIE AND *WEWAYKUM*

In *Wewaykum No. 1*,[35] Justice Binnie, for a unanimous Supreme Court, dismissed claims by the Wewaykum and Wewaikai Indian Bands that, due to a clerical error, the federal Crown breached its fiduciary duty to each of them regarding a reserve and therefore owed them compensation. Shortly after the Supreme Court's rejection of the *Wewaykum No. 1* appeal, the Wewaykum Band filed an information request under the federal *Access to Information Act*[36] in an attempt to determine whether Justice Binnie had had previous involvement in the matter while serving as Associate Deputy Minister of Justice.[37] Information obtained from that request revealed that

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[31] W.P.M. Kennedy, "The British North America Act: Past and Future," (1937) 15 *Can. Bar Rev.* 393 at 398.

[32] While the *Constitution Act, 1867* is, strictly speaking, a British statute, as a governing constitution it cannot properly be interpreted as an ordinary statute because, unlike ordinary statutes, it cannot be amended easily to adapt to changing circumstances. For this reason, the responsibility of "updating" the Act to reflect these changes falls largely to the courts, which is precisely the function articulated by Viscount Sankey in *Edwards*.

[33] Kennedy is not the only person at this time to have had these thoughts. G.F. Henderson, who was also critical of the judgment in the Persons Case, explained it by saying that the Judicial Committee of the Privy Council had no limitations, was not bound to follow precedent and needed not determine disputes on grounds of law alone, but could account for public policy and matters of political expediency: G.F. Henderson, "Eligibility of Women for the Senate" (1929) 7 *Can. Bar Rev.* 617 at 628. Note also the comments of McGillivray J.A. in *Kazakewich v. Kazakewich*, [1937] 1 D.L.R. 548 at 567 (Alta. C.A.), cited, with approval, by Kennedy, *ibid.* at 396:

> It seems to me that none of the observations of Viscount Sankey can be said to provide legal justification for an attempt by Canadian Courts to mould and fashion the Canadian Constitution by judicial legislation so as to make it conform according to their views to the requirements of present day social and economic conditions.

[34] For a more recent affirmation of the "living tree" doctrine in Canadian jurisprudence, see *Hunter v. Southam*, [1984] 2 S.C.R. 145.

[35] *Supra* note 3.

[36] R.S.C. 1985, c. A-1.

[37] In particular, 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 Mr. 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.

there had been exchanges of correspondence[38] between Department of Justice ("DOJ") lawyers and Binnie[39] in which the *Wewaykum* claim was discussed. In addition, the information uncovered that Binnie had attended a meeting with DOJ lawyers during the early stages of the claim, although, as emphasized by the Supreme Court in *Wewaykum No. 2*, these interactions came only in the context of negotiating a Specific Claim[40] based on the Wewaykum Band's assertions and had occurred prior to the filing of a statement of claim by the band.[41]

The correspondence revealed that Binnie provided advice to DOJ lawyers on the *Wewaykum* claim and that his advice was relied upon in drafting the federal Crown's statement of defence once a statement of claim had been filed by the Wewaykum in 1985.[42] As a result of these discoveries, Assistant Deputy Attorney-General James D. Bissell, Q.C. advised the Supreme Court's registrar that he was waiving solicitor-client privilege to the correspondence and would file a motion for directions regarding the steps to be taken, if any, as a result of the information that was uncovered.[43] Bissell attached a statement to his letter which set forth some additional, relevant factual information:

1. that, in his role as Associate Deputy Minister of Justice, Justice Binnie was responsible for all litigation involving the federal government as a party in the common law provinces and the territories of Canada;
2. that he was responsible for Native Law in the department, and;

See *Wewaykum No. 2*, *supra* note 4 at para. 15.

[38] The memos that were discovered pursuant to the Wewaykum Band's information request were, for the most part, memos to Binnie rather than memos written by him.

[39] For greater clarity, references to Justice Binnie prior to his appointment to the bench will be made to "Binnie," except for where it would be unclear to do so.

[40] The term "specific claims," as explained in the *Indian Claims Commission Information Guide*, (Ottawa: Minister of Supply and Services, 1997) refers, at 3, to "the breach or non-fulfilment of government obligations found in treaties, agreements or statutes." This is to be distinguished from "comprehensive claims," which pertain to claims based on unextinguished Aboriginal title where no treaty has been signed. The federal government's definitions of these types of claims are to be found, respectively, in *Outstanding Business – A Native Claims Policy*, (Ottawa: Queen's Printer, 1982) and *In All Fairness – A Native Claims Policy*, (Ottawa: Queen's Printer, 1981).

[41] *Ibid.* at paras. 38, 40, 83, 84.

[42] This is evident in a number of the memos, attached as an Appendix to *Wewaykum No. 2, ibid.*, that make reference to Binnie's advice regarding how to treat the findings of the McKenna-McBride Commission. In particular, note the memo of February 25, 1986 from Mary Temple, Legal Counsel, Native Claims ("Temple") to Bill Scarth, Legal Counsel ("Scarth"), the subsequent memo from Temple to Carol Pepper, Legal Counsel, Specific Claims Branch, Vancouver dated February 27, 1986, and the memo from Scarth to Binnie dated March 3, 1986.

[43] Pursuant to Rule 3 of the *Rules of the Supreme Court* (S.O.R./2002-156, s. 3).

3. that, in preparing for the hearing of the *Wewaykum* appeal before the Supreme Court of Canada, DOJ lawyers had questioned whether Justice Binnie had had any involvement in the case while in the employ of the DOJ, but failed to conduct a thorough examination of the files necessary to answer this query.[44]

The federal Crown served and filed its motion for directions on May 26, 2003. Upon the Supreme Court's receipt of the motion, Justice Binnie recused himself from further dealings on the matter and, on May 27, 2003, filed a statement with the Supreme Court's registrar explaining his position. In the statement, Justice Binnie advised that he had no recollection of his participation in the *Wewaykum* defence.[45] He further emphasized that, at the time in question, he was responsible for providing guidance to DOJ lawyers in several thousand cases.[46] Upon receipt of the federal Crown's motion, the Supreme Court invited submissions by the parties. On June 23, 2003, the Supreme Court heard argument on the motions for directions and motions to vacate its judgment in *Wewaykum No. 1*; the Court released its judgment on the motions on September 26, 2003.

The Supreme Court determined that there was no reasonable apprehension of bias on the part of Justice Binnie and that the judgment in *Wewaykum No. 1* ought to stand. The Court stated that such an apprehension:

> ... 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.[47]

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[44] *Wewaykum No. 2, supra* note 4 at para. 20. Lawyer Vincent O'Donnell, representing the DOJ, acknowledged that DOJ lawyers had recalled, while they were preparing their briefs in *Wewaykum*, that Justice Binnie had worked for the Department and had questioned whether he had had any involvement in the case, but did not follow up on the matter. As he explained, "Counsel did not examine the departmental files with a focus on this question."

[45] As he stated, "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": *ibid.* at para. 23.

[46] *Ibid.*

[47] *Ibid.* at para. 73. The Court rephrased the question, *ibid.* at para. 74 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?

It concluded that no such apprehension was established by the bands, which bore the brunt of establishing its existence. The Court held further that Justice Binnie's prior involvement in *Wewaykum No. 1* "would convince a reasonable person that his role was of a limited supervisory and administrative nature," though it did acknowledge that his role "exceeded *pro forma management* of the files."[48] The Court placed its emphasis upon the fact that Justice Binnie never was counsel to the federal Crown on *Wewaykum No. 1* and that he only advised on the negotiation of the matter, not its litigation.[49] The Court also held that the significant length of time between Justice Binnie's involvement in *Wewaykum No. 1* as Associate Deputy Minister of Justice and his involvement as a judge sitting on the final appeal of the matter was "a significant factor"[50] and rendered it "improbable" that a reasonable person would conclude that bias existed after such a lengthy gap.[51] The Court did not offer stated reasons for this conclusion.

It is beyond the scope of this commentary to delve into a full critique of the Supreme Court's judgment in *Wewaykum No. 2*.[52] Instead, it will concentrate on the question of bias stemming from Justice Binnie's previous involvement in the matter.

Initially, the Supreme Court stated that an allegation of reasonable apprehension of bias is "the manifestation of a broader preoccupation about the image of justice."[53] Ultimately, however, the Supreme Court undermined the impact of its initial focus by holding that, in considering this broad concern, "the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person."[54] Ironically, this qualification subordinates the importance of the public perception of judicial bias to judge-made standards. Is judicial appreciation of judicial bias really the appropriate standard to be using when contemplating public (and, therefore, lay) perceptions of justice? Using public perception as the primary reference point for apprehensions of bias has more to do with the image of justice,

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[48] *Ibid.* at para. 82.
[49] *Ibid.* at paras. 81-2. Relatedly, the Court also said, *ibid.* at para. 71, that "the rule of automatic disqualification [of a judge] 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 [in *Wewaykum No. 2*]."
[50] *Ibid.* at para. 85.
[51] *Ibid.* at para. 89.
[52] That may be seen elsewhere: see Rotman, "Let Us Face It", *supra* note 5.
[53] *Wewaykum No. 2*, *supra* note 4 at para. 66.
[54] *Ibid.* at para. 67.

broadly conceived, than with the standard of reasonable apprehension of bias, which cannot entirely capture the essence of the public's primary concern regarding the administration of justice.

Given that the nature of the inquiry in *Wewaykum No. 2* was based upon apprehension and perception, the fact that the Court found an apprehension of bias on the part of Justice Binnie to be "improbable" seems to ignore the fact that that adjective is more akin to "unlikely" than to "never." In light of the facts in *Wewaykum No. 1* and the potential consequences of a finding of reasonable apprehension of bias, it would seem "reasonable" to suggest that if there were legitimate fears about the public perception of bias in *Wewaykum No. 1*, those fears would need to be dispelled completely and absolutely by the Court's analysis to remove their possible taint on the *Wewaykum No. 1* judgment. The probable dissipation of those fears, as was the case in *Wewaykum No. 2*, would not be enough.

IV. THE PERCEPTION OF BIAS

While the actions of Justices Bastarache and Binnie pose different problems, they share in common the perception of bias vis-à-vis the resolution of Aboriginal and treaty-rights issues in the Supreme Court of Canada. Because of the Supreme Court's leadership in the fashioning of legal "tests" and other methods of inquiry into complex Aboriginal and treaty rights claims, when Aboriginal peoples and other members of the public lose confidence in the Supreme Court's ability to make unbiased pronouncements, the effects reach across the country and down to courts of first instance. As suggested earlier, this has a chilling effect on the use of negotiation and litigation for the resolution of Aboriginal claims.

The importance of maintaining confidence in the administration of justice reaches through many areas of legal concentration. The test for bias in administrative law, which considers whether a "reasonable apprehension of bias" exists (as opposed to demonstrable bias), is just one manifestation of law's desire to maintain the *perception* of justice being done over and

above justice *actually being done*.[55] Emphasizing public confidence in the justice system is also present in judicial commentaries across various jurisdictions. For example, in *R. v. Gough*, Lord Goff emphasized that "there is an overriding public interest that there should be confidence in the integrity of the administration of justice."[56] Closer to home, Justice Sopinka's majority judgment in *MacDonald Estate v. Martin*[57] also underscores the importance of the public's confidence in the administration of justice. In that case, a lawyer who shifted her employment from a firm acting on one side of a legal dispute to the firm representing the other side, raised the potential of a conflict of interest and improper sharing of confidential information. In considering whether the lawyer's new firm could continue to represent its client in the matter in question, Justice Sopinka's primary emphasis was upon maintaining public confidence in the administration of justice:

> The legal profession has historically struggled to maintain the respect of the public. This has been so notwithstanding the high standards that, generally, have been maintained. When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened. Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.[58]

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[55] This test, as established by de Grandpré J.'s dissenting judgment in the Supreme Court of Canada's decision in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394-5 requires that:

> ... 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. ... [T]hat 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."

These reasons were subsequently affirmed by the Supreme Court, including in *Valente v. The Queen*, [1985] 2 S.C.R. 673 and *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, which are specifically concerned with the actions of judges, and in *Wewaykum No. 2, supra* note 4.

[56] [1993] A.C. 646 at 659 (H.L.) at para. 8.

[57] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235.

[58] *Ibid.* at 1244. In his minority judgment, Cory J. similarly concluded, at 1265, that:

> Neither the merger of law firms nor the mobility of lawyers can be permitted to affect adversely the public's confidence in the judicial system. ... [I]t is fundamentally important that justice not only be done, but appear to be done in the eyes of the public.

Further commentary on the effects of potential conflicts of interest by lawyers that could damage the interests of former clients – and thus affect the perception of justice being done – may be observed in the Supreme Court's unanimous judgment in *R. v. Neil*,[59] which was, ironically, rendered by Justice Binnie. In that case, he emphasized that:

> ... it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained ... Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies ...[60]

Justice Binnie further stated that "The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests."[61]

As emphasized in *MacDonald Estate v. Martin* and *R. v. Neil*, lawyers play an essential role in the administration of justice and must be seen to be free of conflicts that would taint the public's perception of justice being done. Clearly, the role of judges, and the presumptions surrounding them, is far more vital to the public's image, and sense, of justice. As a result, a conflict of interest would seem to have a greater impact on the public's perception of justice when it involves a judge than when it involves a lawyer. Thus, the Supreme Court's deep concern over the potential conflicts of interest in *MacDonald Estate v. Martin* and *R. v. Neil* ought to be magnified where allegations of judicial partiality exist.

Impartiality does not mean that a judge has no personal opinion on a matter. Rather, it means that a judge is able to set aside preconceived notions and ensure that a litigant or accused receives a fair trial. As Dickson J., as he then was, once wrote, "Judges are human. ... They may hold strong views on many issues; yet when presiding at a trial, those views must be cast aside. The judge must show, to the extent of his ability, open-mindedness, courtesy and patience."[62] Justice Bastarache made a similar statement himself when he said, "True impartiality does not

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[59] [2002] 3 S.C.R. 631, 2002 SCC 70.
[60] *Ibid.* at para. 12 [references omitted].
[61] *Ibid.* at para. 13.
[62] Hon. Brian Dickson, "The Role and Function of Judges" (1980) 14 *L.S.U.C. Gaz.* 138 at 143.

require that the judge not have sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."[63]

From the perspective of a litigant or accused, the notion of receiving a fair trial is predicated upon the belief that justice is blind. Where a judge has made public statements in the manner that Justice Bastarache did, one's notional understanding of blind justice is irreparably shattered. While a judge's expression of personal views may not render that judge unable to make a judicial determination based on the facts as presented, in order to maintain the public's confidence in the judicial system the judge's actual ability to overcome preformed opinions or preconceived notions must be subordinate to the public perception of that judge's ability to act impartially. Similarly, when a judge once had involvement in a matter that he or she later sat on as a judge, as was the situation with Justice Binnie in the *Wewaykum* matter, the spectre of bias or conflict of interest is difficult to shed.

While the mere appearance of bias need not, and may not, carry bias along with it, public perception and confidence is integral to the functionality of the judicial system in a democratic society.[64] Appreciating this notion is essential to understanding the rationale behind the decision of the House of Lords in *Pinochet (No. 2)*,[65] which overturned its earlier judgment in *Pinochet (No. 1)* because of the perception of bias on the part of one of the law lords adjudicating the matter.[66] In *Pinochet (No. 1)*, the House of Lords had determined that former Chilean dictator General Augusto Pinochet did not enjoy diplomatic immunity from arrest and extradition in connection with alleged crimes against humanity allegedly committed while he served as Chilean

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[63] Luiza. Chwialkowska, "Revamped bench big on unanimity" *National Post* (22 January 2001) A8 at A10.

[64] This was recognized by the Supreme Court of Canada in *Re Therrien*, [2001] 2 S.C.R. 3 at para. 147:

> The public's invaluable confidence in its justice system, which every judge must strive to preserve, is at the very heart of this case. The issue of confidence governs every aspect of this case, and ultimately dictates the result. Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.

[65] *R. v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No. 2)*, [1999] All E.R. 577 (H.L.) ["*Pinochet (No. 2)*"].

[66] *R. v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte*, [1998] 3 W.L.R. 1456 (H.L.) ["*Pinochet (No. 1)*"].

head of state. That judgment was vacated by *Pinochet (No. 2)* because Lord Hoffman, one of the five judges who decided *Pinochet (No. 1)*, had failed to disclose that he was an unpaid director and chairperson of Amnesty International Charity Limited – an organization established and controlled by Amnesty International ("AI"), a non-profit humanitarian organization – and that his wife was employed by AI.

Are the situations involving Justices Bastarache and Binnie similar to that in *Pinochet (No. 1)*? Alan Gold, then-president of the Criminal Lawyers Association, whose group filed a complaint against Justice Bastarache to the Canadian Judicial Council, alleged that Justice Bastarache's actions were worse than Lord Hoffman's lack of disclosure in *Pinochet (No. 1)*, calling the latter "... a drop in the bucket compared to here, where you have a judge actually expressing preconceived views."[67] Meanwhile, the fact that Justice Bastarache commented on the *Marshall* case without having sat on the panel hearing was said by then-Grand Chief Matthew Coon Come of the Assembly of First Nations to have "brought the judiciary into disrepute by questioning the outcome of a case before the Supreme Court – his own court – where he had not even been present to hear arguments."[68]

Although Justice Bastarache did not comment on any Aboriginal law judgments on which he sat, he has been a sitting judge on Aboriginal law cases since his appointment to the Supreme Court. Do his statements indicate a prevailing bias that unfairly tainted those decisions, rendering them no less able to stand than *Pinochet No. 1*, notwithstanding the findings of the Judicial Conduct Committee of the CJC? While counsel for any party in a case before Justice Bastarache subsequent to his comments may request his recusal, no such opportunity was afforded to those litigants whose appeals Justice Bastarache has sat on, but whose judgments had not been released at the time his comments were made; in the Aboriginal and treaty rights context, this would include the Supreme Court's decision in *Musqueam Indian Band v. Glass*,[69] where Justice

[67] Kirk Makin, "Judge's comments assailed" *Globe and Mail* (8 February 2001) A3.
[68] *Ibid.*
[69] [20001] 2 S.C.R. 633.

Bastarache concurred in the majority's result, but differed from the meaning of "current land value" proffered by both the majority and the dissenting judgments.[70]

Justice Binnie's actions would appear to be even more akin to the *Pinochet (No. 1)* scenario than those of Justice Bastarache. Whether or not he recalled having provided opinions on the *Wewaykum* matter while Associate Deputy Minister of Justice, surely he ought to have perceived that he could have done so given his position and his responsibility for Aboriginal legal matters. Thus, he ought to have recused himself from *Wewaykum No. 1* in order to avoid the very problems that arose in *Pinochet (No. 1)*.[71] Interestingly, in *Wewaykum No. 2*,[72] the Supreme Court distinguished *Pinochet (No. 1)* from the situation, as the Court perceived it, in *Wewaykum No. 1* because of its determination that Justice Binnie had no financial interest in the appeals or an interest in their subject matter such that he was effectively in the position of a party to the cause.[73]

Given the emphasis on the perspective of the reasonable person regarding the potential for bias in *Wewaykum No. 2*, it would be interesting to consider whether the perspective of the reasonable and informed *Aboriginal* person viewing Justice Binnie's prior involvement in the *Wewaykum* matter would come to the same conclusion as the (presumably non-Aboriginal) reasonable person in *Wewaykum No. 2*. A negative answer would seem to buttress the claims made herein about the effects of Justice Binnie's conflict of interest in *Wewaykum* – if not also the potential bias of Justice Bastarache – upon Aboriginal peoples' perception of justice being done with regard to their disputes with the Crown.

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[70] For discussion of the *Glass* case, see Leonard I. Rotman, "Developments in Aboriginal Law: The 2000-2001 Term" (2002) 15 S.C.L.R. (2d) 1.

[71] Indeed, judges have recused themselves for conflicts for far less important reasons. For example, an English judge named Barrington Black who had been scheduled to preside over the trial of a woman whose dog was alleged to have bit a jogger, recused himself from the matter because his dog, Vinnie, "had been filmed frolicking on Hampstead Heath in north London with the defendant's dog, Zak, and that the video would be offered in evidence.": see Associated Press, "British judge resigns from case as his dog appears for defence," 31 July 2003, online: CNEWS <http://cnews.canoe.ca/CNEWS/WeirdNews/2003/07/31/150635-ap.html> (last accessed 5 November 2003).

[72] *Supra* note 4 at paras. 71-2.

[73] *Ibid.* at para. 72.

V. CONCLUSION

While the actions of individual judges ought not be sufficient to shake confidence in the ability of Canadian courts to do justice regarding Aboriginal and treaty rights claims, the unique role of the Supreme Court of Canada and, in particular, the extent to which lower courts have become dependent upon it for guidance vis-à-vis the resolution of such claims, renders the actions of two of its sitting judges more important than what might be the case in different circumstances.

The status of the judge in a democratic society plays a significant role in the effect of extra-judicial commentary. There is an air of authority that accompanies a judge's remarks simply because they are made by a judge. This holds true even where the judge's statement is not made while wearing judicial robes or sitting behind a raised dais in a formal courtroom. The public perception of a judge's authority transcends the trappings of the judicial office. For this reason, the special authority conferred on judges must not be used to enhance one's personal platform or agenda.

As a result of the complaints lodged in response to Justice Bastarache's comments as well as the concerns they raise, any judge who is inclined to engage in similar actions ought to contemplate the words of Lord Desmond Ackner of the British House of Lords who, when asked what he thought of judges' ability to speak candidly to the public, said "[i]t reminds me of what the mother whale said to the baby whale – they can only shoot at you when you are spouting."[74] Curiously, Justice Bastarache appears to have backtracked from his earlier actions; while sitting on a panel entitled "The Complacent Silence of the World of Justice: A Duty to Speak Out for Judges and Lawyers. Vocal majority vs. voiceless minority. What is our role?" at a Canadian Bar Association conference in August, 2003, he advocated that judges refrain from commenting on public issues outside of the courtroom. As he put it, "I personally believe there is a price to pay for exercising the judicial role. Reticence, it seems to me, is a small price to pay to assure judicial independence."[75]

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[74] As quoted in David Vienneau, "Sopinka, Robins spar over speaking out" *Law Times* (12-18 August 1991).
[75] David Gambrill, "Judges butt heads on freedom to speak" *Law Times* (25 August 2003) at 2.

As for the circumstances surrounding Justice Binnie's involvement in *Wewaykum*, it is probable that such a scenario will recur, albeit likely now with a different judge. Presumably, there are a great many judges whose pre-judicial legal lives could one day return to raise the spectre of conflict of interest on their parts. Indeed, Justice Iacobucci recently recused himself from the panel in *Authorson v. Canada*[76] because of a potential conflict of interest emanating from his former position as federal Deputy Minister of Justice.[77] Where a potential for judicial conflict exists, it cannot be swept under the rug without further ramifications, as seen, for example, in *Wewaykum No. 2*.

Although Justices Bastarache and Binnie were cleared of any wrongdoing as a result of their actions discussed above, public concern does not disappear instantaneously as a result of decrees of the lack of judicial impropriety by the CJC and the Supreme Court of Canada. With all due deference to these notable bodies, in these circumstances, the passage of time will likely play a more meaningful role in healing the scars created by these controversies than their findings will.

[76] 2003 SCC 39, a case involving war veterans' pensions.
[77] [2003] 2 S.C.R. 40, 2003 SCC 39.