Canadian Pacific Ltd. *v.* Matsqui Indian Band, [1995] 1 S.C.R. 3

Matsqui Indian Band and Matsqui Indian Band Council *Appellants*

v.

Canadian Pacific Limited and Unitel Communications Inc. *Respondents*

and

Indian Taxation Advisory Board *Intervener*

and between

Siska Indian Band and Siska Indian Band Council, Kanaka Bar Indian Band and Kanaka Bar Indian Band Council, Nicomen Indian Band and Nicomen Indian Band Council, Shuswap Indian Band and Shuswap Indian Band Council, Skuppah Indian Band and Skuppah Indian Band Council and Spuzzum Indian Band and Spuzzum Indian Band Council *Appellants*

v.

Canadian Pacific Limited *Respondent*

and

Indian Taxation Advisory Board *Intervener*

Indexed as: Canadian Pacific Ltd. *v.* Matsqui Indian Band

File No.: 23643.

1994: October 11; 1995: January 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the federal court of appeal

Administrative law -- Tribunals -- Adequacy of tribunal -- Issue of jurisdiction -- Tribunals set up by First Nations bands to consider issue of assessment for lands located within reserve -- Appeal process culminating with review by courts -- Tribunal members without fixed salary and security of tenure -- Claim that land not within reserve -- Whether consideration of issue compelled to follow alternative appeal route or whether courts can grant immediate judicial review -- Whether tribunals meeting criteria of independent judiciary -- Indian Act, R.S.C., 1985, c. I-5, s. 83(1), (3) -- Federal Court Act, R.S.C., 1985, c. F-7, ss. 18, 18.3(1), 18.5, 24(1).

Aboriginal law -- Tribunals set up by First Nations bands to consider issue of assessment for lands located within reserve -- Appeal process culminating with review by courts -- Tribunal members without fixed salary and security of tenure -- Claim that land not within reserve -- Whether consideration of issue compelled to follow alternative appeal route or whether courts can

grant immediate judicial review -- Whether tribunals meeting criteria of independent judiciary.

Amendments to the *Indian Act* enabled First Nations bands to pass their own by-laws for the levying of taxes against real property on reserve lands. The appellant bands each developed taxation and assessment by-laws which were implemented following the Minister's approval. The Matsqui Band's assessment by-law provided for the appointment of Courts of Revision to hear appeals from the assessments, the appointment of an Assessment Review Committee to hear appeals from the decisions of the Courts of Revision and, finally, an appeal on questions of law to the Federal Court, Trial Division from the decisions of the Assessment Review Committee. The other bands provided for a single hearing before a Board of Review, with an appeal to the Federal Court, Trial Division. All the by-laws provided that members of the appeal tribunals could be paid, but did not mandate that they indeed be paid, and gave no tenure of office so that members might not be appointed to sit on future assessment appeals. Members of the bands could be appointed to the tribunals.

The appeals were heard concurrently at all levels and turned on essentially identical facts. Each appellant sent the respondent, Canadian Pacific Limited ("CP"), a notice of assessment in respect of the land forming its rail line which ran through the reserves. The Matsqui Band also sent a notice of assessment to the respondent, Unitel Communications Inc., which laid fibre optic cables on the CP land.

The respondents commenced an application for judicial review in the Federal Court, Trial Division, requesting that the assessments be set aside. CP claimed that its land could not be taxed by the appellant bands because it possessed fee simple in the rail line and the rail line therefore formed no part of the reserve lands. The appellants brought a motion to strike the respondents' application for judicial review on the grounds that: (a) the application was directed against a decision which could not be the subject of judicial review because of an eventual right of appeal to the Federal Court, Trial Division or, alternatively; (b) the assessment by-laws provided for an adequate alternative remedy -- an eventual right of appeal to the Federal Court, Trial Division. The motions judge accepted the second of these arguments and struck out the respondents' application for judicial review. The Federal Court of Appeal allowed an appeal from this decision, set it aside and dismissed the appellants' motion to strike. At issue was whether the motions judge properly exercised his discretion to strike the respondents' application for judicial review, thereby requiring them to pursue their jurisdictional challenge through the appeal procedures established by the appellant bands. The determination of whether or not the land was "in the reserve" was not at issue.

Held (L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ. dissenting): The appeal should be dismissed.

Adequacy of the Appeal Tribunals and the Exercise of Discretion on Judicial Review

Per Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: Administrative tribunals can examine the boundaries of their jurisdiction although their decisions in this regard lack the force of *res judicata*. Their determinations are reviewable on a correctness standard and will generally be afforded little deference. Here, the jurisdiction of the appeal tribunals includes both the classification of taxable property and the valuation of that property, as the words "assessment"/"*évaluation"* used in s. 83(3) of the *Indian Act* refer to the entire process undertaken by tax assessors. A purposive analysis favours this "process approach". Parliament clearly intended the bands to assume control over the assessment process on the reserves, since the entire scheme would be pointless if assessors were unable to engage in the preliminary determination of whether land should be classified as taxable and thereby placed on the taxation rolls.

The Federal Court, Trial Division and the appeal tribunals established under s. 83(3) of the *Indian Act* have concurrent jurisdiction to hear and decide the question of whether the respondents' land is "in the reserve". In keeping with the traditionally discretionary nature of judicial review, judges of the Federal Court, Trial Division have discretion in determining whether judicial review should be undertaken. In determining whether to undertake judicial review rather than requiring an applicant to proceed through a statutory appeal procedure, courts should consider: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). The category of factors should not be closed, as it is for courts in particular circumstances to isolate and balance the factors that are relevant.

The adequacy of the statutory appeal procedures created by the bands, and not simply the adequacy of the appeal tribunals, had to be considered because the bands had provided for appeals from the tribunals to the Federal Court, Trial Division. Certain factors are relevant only to the appeal tribunals (i.e., the expertise of members, or allegations of bias) or to the appeal to the Federal Court, Trial Division (i.e., whether this appeal is *intra vires* the bands). In applying the adequate alternative remedy principle, all these factors must be considered in order to assess the overall statutory scheme.

It was not an error for the motions judge to consider the policy underlying the scheme in determining how to exercise his discretion to undertake judicial review. He could reasonably conclude that, since the scheme was part of the policy promoting Aboriginal self-government, allowing the respondents to circumvent the appeal procedures would be detrimental to the overall scheme.

The bands have jurisdiction to create by-laws with appeals to the Federal Court, Trial Division. Section 18.5 of the *Federal Court Act* does not set down conditions for the creation of statutory appeals from decisions of federal tribunals; it only limits the judicial review powers of the Federal Court, Trial Division where a statutory right of appeal exists. Section 24(1) provides that the Trial Division has exclusive original jurisdiction to hear and determine all appeals that, under any Act of Parliament, may be taken to the court. The appeal procedures here fell squarely within this section because they were authorized "under" s. 83(3) of the *Indian Act*.

Parliament intended the bands to have considerable scope for creating appeal procedures through their by-laws, with the caveat that such procedures would be "subject to the approval of the Minister" (s. 83(1)). The Minister approved all of the by-laws at issue, clearly believing that the power to create appeals to the Federal Court, Trial Division was *intra vires* the bands. The courts should not narrow the scope of possible appeal procedures available to the bands.

The question to be determined was whether the appeal tribunals here were adequate fora; it was not necessary to consider whether they were better fora than the courts. They allowed for a wide-ranging inquiry into all of the evidence and were considered by Parliament to be equipped to deal with complex issues that might come before them. Section 18.3(1) of the *Federal Court Act* allows an appeal tribunal to seek the guidance of the courts if it encounters legal, procedural or other issues which it cannot resolve.

It was reasonable for the motions judge to consider the following factors in exercising this discretion: (1) the tribunals were adequate for purposes of conducting a far-reaching and extensive inquiry at first instance; (2), the statutory appeal procedure provided an appeal from the tribunals to the Federal Court, Trial Division where a decision could be taken with the force of *res judicata*; and (3), the policy of promoting the development of Aboriginal governmental institutions favoured resolving the dispute within the statutory appeal procedures.

Per La Forest J.: The Federal Court, Trial Division and the appeal tribunals established under s. 83(3) of the *Indian Act* have concurrent jurisdiction

to address the question whether the respondents' land is "in the reserve". The motions judge, however, did not exercise his discretion properly in deciding that the band appeal tribunal system constitutes an adequate alternative remedy in this context. Determining whether the respondents' land is "in the reserve" is a jurisdictional question that brings into play discrete and technical legal issues falling outside the specific expertise of the band appeal tribunals. It is ultimately a matter for the judiciary. The band appeal procedure is not an adequate remedy since any decision by a band appeal tribunal regarding this question will lack the force of *res judicata* and will be reviewable by the Federal Court, Trial Division on a standard of correctness. The respondents should be allowed the opportunity to have this jurisdictional question determined with the force of *res judicata* by the Federal Court at the outset without being compelled to proceed through a lengthy, and possibly needless, band appeal process.

Per McLachlin and Major JJ.: The adequate alternative remedies principle does not apply to a jurisdictional issue. Here, the assessment review board has jurisdiction to determine all questions relating to the valuation of land "within the reserve" but has no jurisdiction to determine whether a parcel of land is "within the reserve". Deciding whether land is "within the reserve" or not requires consideration of a variety of factors, such as real property law, survey results, and treaty interpretations, in which the board has no expertise and over which there is no evidence that Parliament had any intention to grant the board jurisdiction.

The board here would be deciding upon its jurisdiction when deciding whether or not the land was "within the reserve" as opposed to acting within its

jurisdiction. A court, on an application for judicial review on this issue, could apply the standard of correctness. Where the fundamental issue of lack of jurisdiction is raised as the only issue, the respondent should not be compelled to proceed needlessly to the appeal tribunal because it is not an adequate alternative remedy in that it cannot determine the question. Rather, a party can either have the tribunal consider the jurisdictional matter (but this option is not mandatory) or have recourse directly to court on the jurisdictional matter.

Institutional Impartiality

Per Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: Impartiality refers to the state of mind or attitude of the decison-maker whereas independence involves both the individual independence of members of the tribunal and the institutional independence of the tribunal. Institutional impartiality and institutional independence were both at issue here. With respect to impartiality, if no reasonable apprehension of bias arises in the mind of a fully informed person in a substantial number of cases, allegations of an apprehension of bias cannot be brought on an institutional level but must be dealt with on a case-by-case basis. This determination must be made having regard for a number of factors including, but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them.

No apprehension of bias arose from want of structural impartiality. It is appropriate to have band members sit on appeal tribunals to reflect community interests. A pecuniary interest that members of a tribunal might be alleged to have, such as an interest in increasing taxes to maximize band revenue, is far too

attenuated and remote to give rise to a reasonable apprehension of bias at a structural level. No personal and distinct interest in money raised exists on the part of tribunal members, and any potential for conflict between the interests of members of the tribunal and those of parties appearing before them was speculative at this stage. Any allegations of bias which might arise should be dealt with on a case-by-case basis.

Institutional Independence

Per L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ.: The reasons of Lamer C.J. were agreed with on all issues, except the issue of lack of institutional independence, as a ground for finding the motions judge erred in exercising his discretion to refuse judicial review.

First, the issue of bias was not properly raised at first instance. Second, appellate courts must defer to the exercise of the motion judge's discretion to strike out unless the conclusion is unreasonable or has been reached on the basis of irrelevant or erroneous considerations, a wrong principle or as a result of insufficient or no weight having been given to a relevant consideration. The discretion to exercise judicial review is not being assessed *de novo* in this Court. The motions judge here did not err in declining to consider the question of reasonable apprehension of lack of institutional independence at this stage.

The essential conditions of institutional independence in the judicial context need not be applied with the same strictness in the case of administrative tribunals. Conditions of institutional independence must take into account their

operational context. This context includes that the band taxation scheme was part of a nascent attempt to foster Aboriginal self-government. This contextual consideration applies to assessing whether the bias issue was premature and extends to the entire exercise of judicial discretion. Furthermore, before concluding that the by-laws in question deprive the band taxation tribunals of institutional independence, they should be interpreted in the context of the fullest knowledge of how they are applied in practice. The reasonable person, before making a determination of whether or not he or she would have a reasonable apprehension of bias, should have the benefit of knowing how the tribunal operates in actual practice. Case law has tended to consider the institutional bias question after the tribunal has been appointed and/or actually rendered judgment. It is not safe to form final conclusions as to the workings of this institution on the wording of the by-laws alone. Knowledge of the operational reality of these missing elements may very well provide a significantly richer context for objective consideration of this institution and its relationships.

Per Lamer C.J. and Cory J.: Allegations of bias arising from the want of institutional independence cannot be avoided by simply deferring to the exercise of discretion by the motions judge. A lack of sufficient institutional independence in the bands' tribunals is a relevant factor which must be taken into account in determining whether the respondents should be required to pursue their jurisdictional challenge before those tribunals. Although the larger context of Aboriginal self-government informs the determination of whether the statutory appeal procedures established by the appellants constitute an adequate alternative remedy, this context is not relevant to the question of whether the bands' tribunals give rise to a reasonable apprehension of bias at an institutional level. Principles

of natural justice apply to the bands' tribunals and are not diluted by a federal policy of promoting Aboriginal self-government.

Judicial independence is a long standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection. Natural justice requires that a party be heard by a tribunal that not only is independent but also appears to be so. The principles for judicial independence accordingly apply in the case of an administrative tribunal functioning as an adjudicative body. A strict application of the principles for judicial independence is, however, not always warranted. Therefore, while administrative tribunals are subject to these principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) depends on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office. Cases dealing with the security of the person require a high level of independence and warrant a stricter application of the applicable principles. Here, the bands' administrative tribunals are adjudicating disputes about property taxes and a more flexible approach is clearly warranted.

Even given a flexible application of the principles for judicial independence, a reasonable and right-minded person, viewing the whole procedure in the assessment by-laws, would have a reasonable apprehension that members of the appeal tribunals are not sufficiently independent. Three factors lead to this conclusion: (1) the complete absence of financial security for members of the tribunals; (2) the complete absence of security of tenure (in the case of Siska), or

ambiguous and therefore inadequate security of tenure (in the case of Matsqui); and (3) the fact that the tribunals, whose members are appointed by the Band Chiefs and Councils, are being asked to adjudicate a dispute pitting the interests of the bands against outside interests. Effectively, the tribunal members must determine the interests of the very people, the bands, to whom they owe their appointments. These three factors in combination lead to the conclusion that the tribunals lack sufficient independence in this case; any one factor in isolation would not necessarily lead to the same conclusion.

Although the allegations of an absence of institutional impartiality were premature, the allegations surrounding institutional independence were not. The two concepts are quite distinct. It is mere speculation to suggest that members of the tribunals will lack impartiality, since it is impossible to know in advance of an actual hearing what these members think. In assessing the institutional independence of the appeal tribunals, however, the inquiry focuses on an objective assessment of the legal structure of the tribunals, of which the by-laws are conclusive evidence. The by-laws merely afford the Band Chiefs and Councils the discretion to provide institutional independence. It is inappropriate to leave issues of tribunal independence to the discretion of those who appoint tribunals.

Cases Cited

By Lamer C.J.

Applied: *R. v. Lippé*, [1991] 2 S.C.R. 114; **considered**: *Abel Skiver Farm Corp. v. Town of Ste-Foy*, [1983] 1 S.C.R. 403; *Terrasses Zarolega Inc. v.*

Régie des installations olympiques, [1981] 1 S.C.R. 94; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Généreux*, [1992] 1 S.C.R. 259; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **referred to**: *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *MacBain v. Lederman*, [1985] 1 F.C. 856; *Sethi v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 552; *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

By Major J.

Considered: *Abel Skiver Farm Corp. v. Town of Ste-Foy*, [1983] 1 S.C.R. 403; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; **referred to**: *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230.

By Sopinka J. (dissenting)

Harelkin v. University of Regina, [1979] 2 S.C.R. 561; *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Alex Couture Inc. v. Canada (Attorney-General)* (1991), 83 D.L.R. (4th) 577, leave to appeal refused, [1992] 2 S.C.R. v; *MacBain v. Lederman*, [1985] 1 F.C. 856; *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363.

Statutes and Regulations Cited

Assessment Act, R.S.B.C. 1979, c. 21.

Assessment Act, R.S.N. 1990, c. A-18.

Assessment Act, R.S.N.B. 1973, c. A-14.

Assessment Act, R.S.N.S. 1989, c. 23.

Assessment Appeal Board Act, R.S.A. 1980, c. A-46.

Assessment By-law [Siska By-law], ss. 40(1), (2), (3), (4), 41(1)(a), (b), (c), (d), (e), (4), 45(1)(a), (b), (c), (d).

Assessment Review Board Act, R.S.O. 1990, c. A.32.

Canadian Charter of Rights and Freedoms, s. 11(*d*).

Federal Court Act, R.S.C., 1985, c. F-7 [am. 1990, c. 8], ss. 18(1)(*a*), (*b*), 18.1(1), (3)(*a*), (*b*), (4)(*a*), 18.3(1), 18.4(1), (2), 18.5, 24(1), (2), 26(1).

Indian Act, R.S.C., 1985, c. I-5 [am. c. 17 (4th Supp.)], ss. 2(1)(*a*), 83(1)(*a*), (2), (3), (4), (5), (6).

Interpretation Act, R.S.C. 1985, c. I-21, s. 2(1)(*a*), (*b*).

Island Regulatory and Appeals Commission Act, S.P.E.I. 1991, c. 18.

Municipal Board Act, S.S. 1988-89, c. M-23.2.

Municipal Taxation Act, S.Q. 1979, c. 72.

Property Assessment By-law [Matsqui By-law], ss. 27 (A), (B), (C), (D), 32 (A)(1), (2), (3), (4), (G), (J), 35 (A)(1), (2), (3), (4), (B), (C), 49 (A), Schedule 10.

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Canada. Indian and Northern Affairs. Indian Taxation Advisory Board. *Introduction to Real Property Taxation on Reserve*. Ottawa: Minister of Supply and Services Canada, 1990.

APPEAL from a judgment of the Federal Court of Appeal, [1993] 2 F.C. 641, 153 N.R. 307, [1994] 1 C.N.L.R. 66, allowing an appeal from a judgment of Joyal J., [1993] 1 F.C. 74, 58 F.T.R. 23, striking out an application for judicial review. Appeal dismissed, L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ. dissenting.

Arthur Pape and *Alisa Noda*, for the appellants Matsqui Indian Band and Matsqui Indian Band Council.

John L. Finlay and *Fiona C. M. Anderson*, for the appellants Siska Indian Band and Siska Indian Band Council, Kanaka Bar Indian Band and Kanaka Bar Indian Band Council, Nicomen Indian Band and Nicomen Indian Band Council, Shuswap Indian Band and Shuswap Indian Band Council, Skuppah Indian Band and

Skuppah Indian Band Council, Spuzzum Indian Band and Spuzzum Indian Band Council.

Norman D. Mullins, Q.C., and *W. A. S. Macfarlane*, for the respondents.

Leslie J. Pinder, for the intervener.

The judgment of Lamer C.J. and Cory J. was delivered by

//*Lamer C.J.*//

LAMER C.J. --

I. Factual Background

1 In 1988, amendments to the *Indian Act*, R.S.C., 1985, c. I-5, as amended by R.S.C. 1985, c. 17 (4th Supp.), came into force which enable Indian bands to establish their own by-laws for the levying of taxes against real property on their reserve lands. These amendments came about after extensive consultations and negotiations between the federal and provincial governments, and representatives of Aboriginal peoples.

2 The appellants are Indian bands with reserves in British Columbia. Their cases have been heard concurrently at all levels and turn on essentially identical facts. In 1992, pursuant to the new tax assessment provisions of the *Indian Act*, the appellants each developed taxation and assessment by-laws which were

implemented following the approval of the Minister of Indian Affairs and Northern Development. The appellant Matsqui Band's assessment by-law provides for the assessment of all real property within the reserve, the preparation of an assessment roll, the giving to all persons concerned of notices of assessment, the appointment of Courts of Revision to hear appeals from the assessments, the appointment of an Assessment Review Committee to hear appeals from the decisions of the Courts of Revision and, finally, an appeal on a question of law to the Federal Court, Trial Division from the decisions of the Assessment Review Committee. The by-laws of the other appellant bands provide for a single hearing before a Board of Review, with an appeal to the Federal Court, Trial Division.

3 Pursuant to those assessment by-laws, notices were sent by each of the appellants to the first respondent, Canadian Pacific Limited ("CP"), in respect of a strip of land running through the reserves over which CP had laid railway tracks. The appellant Matsqui Band also sent a notice of assessment to the second respondent, Unitel Communications Inc. ("Unitel"), which has laid fibreoptic cables on the CP land.

4 The respondents commenced a judicial review application in the Federal Court, Trial Division, requesting that the assessments be set aside. CP and Unitel argued that under s. 83(1) of the *Indian Act*, the Indian bands have authority to tax only land which is "in the reserve". The application was supported by affidavit evidence that the land in question is vested in CP, which had acquired it from the Crown in right of Canada by letters patent issued on August 25, 1891, and had registered it in the New Westminster Land Title Office on August 27, 1891. According to the respondents, land owned by CP is not within the reserves of the

appellants, since the *Indian Act* defines a "reserve" as "a tract of land, the legal title to which is vested in Her Majesty". CP therefore claimed that its land cannot be taxed by the appellant bands.

5 The appellants brought a motion asking that the respondents' application for judicial review be struck out on two grounds, namely that:

(a) the application was directed against a decision which, pursuant to s. 18.5 of the *Federal Court Act*, R.S.C., 1985, c. F-7, as am. by S.C. 1990, c. 8, s. 5, could not be the subject of judicial review since the assessment by-laws expressly provided for a right of appeal to the Federal Court, Trial Division or, in the alternative;

(b) the Court should decline to grant the discretionary remedies applied for because the assessment by-laws provide for an adequate alternative remedy, namely, a right of appeal to an appeal tribunal and, eventually, to the Federal Court, Trial Division.

6 Joyal J. of the Federal Court, Trial Division, [1993] 1 F.C. 74, accepted the second of these arguments and granted the appellants' motion, striking out the application of the respondents for judicial review.

7 The respondents appealed to the Federal Court of Appeal, [1993] 2 F.C. 641, which allowed the appeal, set aside the decision of the Trial Division and dismissed the appellants' motion to strike.

II. Relevant Statutory Provisions

Indian Act, R.S.C., 1985, c. I-5

2. (1) In this Act,

. . .

"reserve"
(*a*) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band. . . .

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(*a*) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

. . .

(2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.

(3) A by-law made under paragraph (1)(*a*) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.

(4) The Minister may approve the whole or a part only of a by-law made under subsection (1).

(5) The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.

(6) A by-law made under this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).

Interpretation Act, R.S.C., 1985, c. I-21

2. (1) In this Act,

. . .

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council;

Federal Court Act, R.S.C., 1985, c. F-7

18. (1) Subject to section 28, the Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal….

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

. . .

(3) On an application for judicial review, the Trial Division may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction. . . .

18.4 (1) Subject to subsection (2), an application or reference to the Trial Division under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

(2) The Trial Division may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

> **18.5** Notwithstanding sections 18 and 18.1, where provision is expressly made by an Act of Parliament for an appeal as such to the Court, to the Supreme Court of Canada, to the Court Martial Appeal Court, to the Tax Court of Canada, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.
>
> **24.** (1) Except as otherwise provided in this Act or any other Act of Parliament, the Trial Division has exclusive original jurisdiction to hear and determine all appeals that under any Act of Parliament may be taken to the Court.
>
> (2) The Rules may transfer original jurisdiction to hear and determine a particular class of appeal from the Trial Division to the Court of Appeal.
>
> **26.** (1) The Trial Division has original jurisdiction in respect of any matter, not allocated specifically to the Court of Appeal, in respect of which jurisdiction has been conferred by any Act of Parliament on the Federal Court, whether referred to as such or as the Exchequer Court of Canada.

III. Decisions Below

A. *Federal Court, Trial Division*, [1993] 1 F.C. 74 (Joyal J.)

8 Joyal J. first reviewed the case law dealing with the availability of judicial review. He noted that these decisions confirmed the jurisdiction of a superior court to hear a case by way of judicial review when a fundamental issue of validity or excess of jurisdiction is raised. After briefly outlining the history of judicial review, he stated at pp. 86-87:

> The basic characteristic, however, of judicial review providing an exceptional or extraordinary remedy must necessarily be maintained. It can only be maintained when no other effective recourse is open to a litigant. Absent any statutory bar to jurisdiction . . . the relief which a court may grant by way of judicial review remains essentially discretionary. On such an application, a court must view all the circumstances of the case and decide if any other recourse or remedy is available. Such a recourse is . . . usually by way of an appeal. As stated by Culliton J.A., in *Wilfong, Re Cathcart v. Lowery* (1962), 32 D.L.R. (2d) 477 (Sask. C.A.), the practice is to

> decline jurisdiction where there is a right of appeal, except under special circumstances.

9 Joyal J. decided to exercise his discretion to refuse to hear the respondents' application for judicial review because the appeal procedures established by the bands were adequate for resolving the respondents' challenge. He relied on the following four factors:

(1) The legislative scheme and the band by-laws reflect extremely important policy issues. Intensive discussions took place between public authorities in British Columbia, the federal authorities at Ottawa, and the Indian bands concerned, in order to set up an elaborate system of assessment and taxation. The provincial and federal authorities have clothed the respective Indian band councils with the mantle of legitimacy in running their own system of taxation. Therefore, it would not be in the public interest and it would not favour public policy to allow CP and Unitel to bypass the appeal provisions in the by-laws.

(2) The issue of whether or not lands are "in the reserve" for the purposes of tax assessment falls within the terms of reference of the appeal procedures.

(3) The appeal tribunals established by the Indian bands are a better forum in which to receive all the evidence relevant to the issue of whether CP's land is "in the reserve". Applications for judicial review are heard summarily and are therefore more limited. Generally, the field of enquiry of an appeal court and the remedies available to it are more extensive than those available pursuant to judicial review.

(4) An appeal to the Federal Court, Trial Division, is available from any decision of the appeal tribunals.

10 In the result, Joyal J. struck out the respondents' application.

11 He declined to consider the argument of the respondents that the provisions permitting band members to sit on the assessment appeal tribunals produced a reasonable apprehension of bias. Joyal J. held that, as there was no evidence before him as to the composition of the panels, such an argument was premature.

B. *Federal Court of Appeal*, [1993] 2 F.C. 641
(Pratte J.A., Decary and Robertson JJ.A. Concurring)

12 Pratte J.A. first considered the argument of the appellants that, as the by-law provided for a right of appeal to the Federal Court, judicial review was barred by s. 18.5 of the *Federal Court Act* (this argument was not advanced by the appellants in this Court). In deciding that there was no merit in this submission, Pratte J.A. further concluded at p. 647 that it was *ultra vires* the bands to create an appeal to the Federal Court, Trial Division:

> The Federal Court is a statutory Court. It was created by the *Federal Court Act* and its jurisdiction is defined by that Act and other statutes. A by-law or regulation adopted pursuant to the *Indian Act* cannot extend the Court's jurisdiction beyond the limits set by Parliament unless there be a statutory provision authorizing the adoption of such a by-law. It is common ground that the respondents' authority to adopt the Assessment By-law and provide for appeals from assessments is derived solely from section 83 of the *Indian Act*. That section requires an assessment by-law to provide "an appeal procedure in respect of assessments". However, it does not confer on band councils, either expressly or by implication, the power to extend the jurisdiction of the Federal Court or other statutory courts by creating a right of appeal to those courts. . . . It follows that this part of the Matsqui Indian Band Assessment By-law, Amendment 1-1992, which creates a right of appeal to the Federal Court, is *ultra vires* and, for

> that reason, cannot be invoked to preclude the judicial review of an assessment under section 18.1 (as enacted *idem*) of the *Federal Court Act*.

13 In allowing the respondents' appeal, Pratte J.A. pointed to several errors committed by Joyal J. First, Joyal J. failed to take into account that the determination as to whether the CP land had been wrongfully entered on the assessment roll could not be resolved without answering other questions which were beyond the jurisdiction of the appeal tribunals, namely: (1) whether the respondents' land and interests are "in the reserve" within the meaning of s. 83(1) of the *Indian Act* so as to enable the appellants to adopt by-laws taxing them; (2) whether the title asserted by CP is valid; and (3) what is the nature of the right acquired by CP by virtue of its title.

14 Second, Pratte J.A. was of the opinion that Joyal J. erred in relying on irrelevant policy considerations relating to the taxation scheme as a cooperative effort promoting the self-sufficiency of Aboriginal peoples.

15 Third, in holding that since s. 18 motions before the Federal Court, Trial Division are heard summarily, the appeal tribunals are a better forum to review all the evidence in this case, Joyal J. ignored the fact that the members of the tribunal are unlikely "to have any experience in the difficult task of presiding over a trial and will not be governed by any rules of procedure enabling them to perform that function" (p. 649). This reasoning also overlooked the fact that the Court has the power to require that a s. 18 application be tried as an action.

16 Finally, Pratte J.A. reiterated that it was incorrect to rely on the availability of an appeal to the Federal Court, Trial Division from the decisions of the appeal

tribunals since, as found earlier, the creation of such a right of appeal was *ultra vires* the bands.

IV. Analysis

A. *Introduction*

17 The respondents argue that their land is not "in the reserve" as required by s. 83(1)(*a*) of the *Indian Act*, and therefore the land may not be taxed by the appellant bands under their new tax assessment powers. This Court is not being asked to determine whether the land is, or is not, "in the reserve". Instead, we must decide whether Joyal J. properly exercised his discretion in refusing to entertain the respondents' application for judicial review, thereby requiring the respondents to pursue their jurisdictional challenge through the appeal procedures established by the appellant bands under s. 83(3) of the *Indian Act*.

18 In considering whether Joyal J. exercised his discretion reasonably, it is important that we not lose sight of Parliament's objective in creating the new Indian taxation powers. The regime which came into force in 1988 is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves. Though this Court is not faced with the issue of Aboriginal self-government directly, the underlying purpose and functions of the Indian tax assessment scheme provide considerable guidance in applying the principles of administrative law to the statutory provisions at issue here. I will therefore employ a purposive and functional approach where appropriate in this ruling.

19 This approach is similar to that taken in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, where Beetz J. adopted a pragmatic and functional analysis of the issue of whether a matter lies within the jurisdiction of a tribunal *stricto sensu* and is thereby insulated from judicial review. As noted above, in the case at bar we are concerned with quite a different matter, namely whether the courts or the statutory appeal procedures are the appropriate forum for determining whether the respondents' lands are "in the reserve". However, a purposive and functional approach is necessary because, to use the words of Beetz J. in *Bibeault* at p. 1089, "it focuses the Court's inquiry directly on the intent of the legislator rather than on interpretation of" isolated provisions.

B. *May the appeal tribunals established under the Indian Act determine whether the respondents' land is "in the reserve"*?

20 In this case, the respondents are challenging the jurisdiction of band tax assessors. Section 83(1)(*a*) of the *Indian Act* allows Aboriginal bands to tax land "in the reserve". Land which is not in the reserve cannot be taxed, and is therefore beyond the jurisdiction of the tax assessors. As with all taxation schemes, tax assessors must make a preliminary determination that something is subject to taxation. In this case, the respondents' land was placed on the taxation rolls of the appellant bands because tax assessors made a preliminary determination that the land was "in the reserve".

21 It is not controversial that the Federal Court, Trial Division is authorized to review the determination by the assessors that the respondents' land is "in the reserve". Sections 18.1(1), (3) and (4) of the *Federal Court Act* clearly authorize the Federal Court, Trial Division to undertake judicial review on jurisdictional matters. This

gives statutory effect to the principle, stated by Beetz J. in *Bibeault*, *supra*, at p. 1086 that where what is at issue is a legislative provision limiting the powers of a tribunal, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

22 What is controversial between the parties in this case is the question of whether the appeal tribunals themselves may entertain questions going to jurisdiction. The respondents argued forcefully that jurisdictional issues can only be determined by superior courts, and not by administrative bodies.

23 It is now settled that while the decisions of administrative tribunals lack the force of *res judicata*, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference.

24 In *Abel Skiver Farm Corp. v. Town of Ste-Foy*, [1983] 1 S.C.R. 403, the question before this Court concerned whether the appellant's lands were "lands under cultivation" within the meaning of s. 523 of Quebec's *Cities and Towns Act*, and thereby entitled to special tax treatment. Assessors for the town decided that the lands did not fall into the special category. Although the *Cities and Towns Act* included a special appeal procedure, the appellant sought to proceed directly to the courts for a determination of whether his lands were "under cultivation". Thus, this case bears important similarities to the case at bar. Beetz J. reached the following conclusion at p. 437:

> In my view, these provisions are sufficiently general to allow a taxpayer like the appellant to complain of the roll as drawn up on the ground that the roll deprives it of the exemption to which it is entitled under s. 523 of the *Cities and Towns Act*, and the members of the council or the board of revision must take this complaint under consideration.
>
> With such a complaint before them, the members of the council or the board of revision cannot avoid making a decision without compromising the integrity of their administrative functions. They must therefore respond in order to exercise the latter in accordance with the law, as much as they are able to do and as everyone must do.
>
> However, they cannot make an error in this regard, because their administrative authority depends on the correctness of the reply which they give to these questions of law. If they make an error, they remain subject to the superintending and reforming power of the Superior Court.
>
> Further, when they respond, they exercise a function which is incidental to their administrative duties, and it does not follow from the fact that they must comply with the law and have occasion to express that law that they must do so as would a court of law. Their response accordingly does not have the final nature of *res judicata*.

25 There can be no doubt that the appeal tribunals created under s. 83(3) of the *Indian Act* have the authority to determine whether the respondents' lands are subject to the taxation by-laws of the appellant bands, although any such decisions of the tribunals will be reviewable on a standard of correctness.

26 The respondents have also argued that the jurisdiction of the appeal tribunals extends only to issues of valuation, on the basis that s. 83(3) of the *Indian Act* states that "[a] by-law. . .must provide an appeal procedure in respect of assessments made for the purposes of taxation". The French text refers to "*évaluation*" as the equivalent of "assessment". The respondents conclude that the use of the terms "assessment" and "*évaluation*" in this context serves to limit the supervision of the appeal tribunals to issues of quantum.

27 I find the respondents' argument unconvincing. In my view, "assessment"/"*évaluation*" refers to the process undertaken by tax assessors, the first step of which is, of course, to classify which parcels of land are taxable, and the second step of which is to value the land for taxation purposes. The "process approach" is supported by the ruling of Chouinard J. in *Terrasses Zarolega Inc. v. Régie des installations olympiques*, [1981] 1 S.C.R. 94. This case involved the expropriation of the appellants' property in relation to the Montreal Olympic Games, and the establishment of an arbitration committee to determine the amount of compensation payable to the appellants. Before the committee was established, the appellants brought an action claiming that the committee could determine the amount of compensation, but could not determine what items were to be compensated. Chouinard J. rejected that argument at p. 104:

> When s. 10 states that: "The former owner shall receive as compensation the sums determined by the arbitration committee contemplated in Division III", these sums must obviously relate to something, to certain items claimed; and in order for sums to be determined in conjunction with items claimed, these items must be determined. There is no basis in the Act for concluding that the legislator intended to make any court other than the arbitration committee responsible for determining the items claimed, on the basis of which various sums are to be determined for inclusion in the compensation to be paid. On the contrary and the reason is precisely because the legislator intended to make the arbitration committee responsible for determining the compensation and the items included in it.

28 A purposive analysis also leads me to favour the "process approach". Parliament clearly intended bands to assume control over the assessment process on the reserves, since the entire scheme would be pointless if assessors were unable to engage in the preliminary determination of whether land should be classified as taxable and thereby placed on the taxation rolls. Given this, I see no reason to interpret s. 83(3) of the *Indian Act* as authorizing appeal procedures related only

to the valuation step of the assessment process. Such narrow supervisory control would be inconsistent with Parliament's purpose in authorizing bands to value and classify property for taxation.

29 I therefore conclude that the Federal Court, Trial Division and the appeal tribunals established under s. 83(3) of the *Indian Act* have concurrent jurisdiction to hear and decide the question of whether the respondents' land is "in the reserve".

C. *Could Joyal J. exercise his discretion to refuse to undertake judicial review in this case*?

30 The respondents had the right to seek judicial review before the Federal Court, Trial Division. That does not mean, however, that they have a right to require the court to undertake judicial review. There is a long-standing general principle that the relief which a court may grant by way of judicial review is, in essence, discretionary. This principle flows from the fact that the prerogative writs are extraordinary remedies. The extraordinary and discretionary nature of the prerogative writs has been subsumed within the provisions for judicial review set out in s. 18.1 of the *Federal Court Act*. In particular, s. 18.1(3) of the Act states:

> **18.1** . . .
>
> (3) On an application for judicial review, the Trial Division may
>
> (*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal. [Emphasis added.]

31 The use of permissive, as opposed to mandatory, language in s. 18.1(3) preserves the traditionally discretionary nature of judicial review. As a result, judges of the Federal Court, Trial Division, such as Joyal J., have discretion in determining whether judicial review should be undertaken.

32 In exercising his discretion, Joyal J. relied on the adequate alternative remedy principle. He found that the statutory appeal procedures were an adequate forum in which the respondents could pursue their jurisdictional challenge and obtain a remedy, and he therefore decided not to undertake judicial review.

33 The adequate alternative remedy principle was fully discussed in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 586, where Beetz J., for the majority, held at p. 576 that "even in cases involving lack of jurisdiction", the prerogative writs maintain their discretionary nature. Dickson J. (as he then was, dissenting), took a narrower view of discretion in the case of jurisdictional error (pp. 608-9). He nevertheless concluded, at p. 610, that where a jurisdictional error "derives from a misinterpretation of a statute, a statutory right of appeal may well be adequate".

34 In *Harelkin*, a student was required to discontinue his studies. His appeal to a university committee failed. Although there was a further appeal available to the university Senate, the student launched proceedings for *certiorari* and *mandamus* before the courts. The issue which is relevant to the case at bar was whether the student was prevented from proceeding to the courts because he had failed to exhaust the appeal opportunities within the university's own regime. Beetz J., for the majority, stated at p. 588:

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.

35 Beetz J. reached the conclusion that the university's own appeal procedure was an adequate alternative remedy and that the lower court should therefore have exercised its discretion not to grant a remedy.

36 The adequate alternative remedy doctrine was later applied in *Canada (Auditor General)* v. *Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49. There, at p. 93, Dickson C.J. confirmed the discretionary nature of the prerogative writs, even in cases involving lack of jurisdiction. He also stated, at p. 95,

> Albeit with the assistance of the wording and scheme of the Act in which the alternative remedy is found, both the fact that ouster needs to be implied and the fact that an evaluation of adequacy is called for suggest that the alternative remedies bar to discretionary judicial relief entails, in reality, a decision by the courts on the appropriateness of their intervention, and less a clear statement of intention by Parliament. By not unambiguously highlighting the exclusivity of the statutory remedy, Parliament leaves it to the judiciary to define its role in relation to that remedy. [Emphasis in original.]

Furthermore, at p. 96,

> It may well be that once the alternative remedy is found to be adequate discretionary relief is barred, but this is nothing but a reflection of the judicial concern to exercise discretion in a consistent and principled manner. Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant to the inquiry into adequacy

37 On the basis of the above, I conclude that a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant.

38 In this case, when applying the adequate alternative remedy principle, we must consider the adequacy of the statutory appeal procedures created by the bands, and not simply the adequacy of the appeal tribunals. This is because the bands have provided for appeals from the tribunals to the Federal Court, Trial Division. I recognize that certain factors will be relevant only to the appeal tribunals (i.e., the expertise of members, or allegations of bias) or to the appeal to the Federal Court, Trial Division (i.e., whether this appeal is *intra vires* the bands). In applying the adequate alternative remedy principle, all these factors must be considered in order to assess the overall statutory scheme.

39 Joyal J. applied the adequate alternative remedy principle and, after considering various factors, exercised his discretion to require the respondents to take their jurisdictional challenge before the appeal procedures established by the appellant bands. This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in *Hadmor*

Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042, at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

40 I will consider four issues in connection with Joyal J.'s exercise of discretion pursuant to the adequate alternative remedy principle:

(i) Was it an error for Joyal J. to consider the policy considerations behind the assessment by-laws in determining how his discretion should be exercised?

(ii) Is it *ultra vires* the bands to enact assessment by-laws creating an appeal from the appeal tribunals to the Federal Court, Trial Division?

(iii) Was it unreasonable for Joyal J. to conclude that the statutory appeal tribunals were a better forum in which to consider at first instance the issue raised by the respondents?

(iv) Is there a reasonable apprehension of bias in the appeal tribunals which would evidence the inadequacy of the statutory appeal procedures?

(i) Was it an error for Joyal J. to consider the policy considerations behind the assessment by-laws in determining how his discretion should be exercised?

41 Joyal J. pointed to the promotion of Aboriginal self-government as a policy consideration weighing in favour of exercising his discretion to refuse to undertake judicial review. Pratte J.A., in the Federal Court of Appeal, concluded that these policy considerations were irrelevant to the resolution of the legal questions raised by the respondents. With respect, Pratte J.A. confused the issue of the merits of the respondents' claim with the issue of whether the statutory appeal procedures provide an adequate remedy for the respondents. I leave it as an open question whether the policy concerns in play here are relevant to the question of whether the respondents' lands are "in the reserve". However, I certainly cannot say that these policy considerations are irrelevant in determining whether the appeal procedures provide an adequate alternative remedy.

42 As I noted above, I do not think that the factors which may be taken into account in the exercise of discretion under the alternative remedy principle are closed. If a factor is relevant, it should be considered.

43 Here, the evidence indicates that the purpose of the tax assessment scheme is to promote the interests of Aboriginal peoples and to further the aims of self-government. Although the scheme resembles the kind of tax assessment regime we see at the municipal level of government in Canada, it is more ambitious in what it sets out to achieve. The scheme seeks to provide governmental experience to Aboriginal bands, allowing them to develop the skills which they will need for self-government.

44 It was open to Joyal J. to conclude that allowing the respondents to circumvent the appeal procedures created by the bands in their assessment by-laws would be

detrimental to the overall scheme, in light of its policy objectives. It is not unreasonable to conclude that since the scheme is part of the policy of promoting Aboriginal self-government, issues should be resolved within the system developed by Aboriginal peoples before recourse is taken to external institutions.

45 This conclusion finds support in the ruling of this Court in *Harelkin*, *supra*. There, in determining whether the student should be required to proceed through the University of Regina's internal appeal scheme, Beetz J. stated the following at p. 595:

> Sections 78(1)(*c*) [which provides for appeals to the University Senate] and 33(1)(*e*) are in my view inspired by the general intent of the Legislature that intestine grievances preferably be resolved internally by the means provided in the Act, the university thus being given the chance to correct its own errors, consonantly with the traditional autonomy of universities as well as with expeditiousness and low cost for the public and the members of the university. While of course not amounting to privative clauses, provisions like ss. 55, 66, 33(1)(*e*) and 78(1)(*c*) are a clear signal to the courts that they should use restraint and be slow to intervene in university affairs by means of discretionary writs whenever it is still possible for the university to correct its errors with its own institutional means. [Emphasis added.]

46 Similarly, s. 83(3) of the *Indian Act* has the purpose of allowing bands to develop their own internal appeal procedures. It was reasonable for Joyal J. to conclude that he should respect the appeal procedures developed by the appellant bands.

(ii) Is it ultra vires the bands to enact assessment by-laws creating an appeal from the appeal tribunals to the Federal Court, Trial Division?

47 Pratte J.A. of the Federal Court of Appeal concluded that the appellant bands acted *ultra vires* in creating appeals to the Federal Court, Trial Division in their by-laws. With respect, I am of the view that he erred.

48 Pratte J.A. relied on s. 18.5 of the *Federal Court Act*. That provision states:

> **18.5** Notwithstanding sections 18 and 18.1, where provision is expressly made by an Act of Parliament for an appeal as such to the Court, to the Supreme Court of Canada, to the Court Martial Appeal Court, to the Tax Court of Canada, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

49 Pratte J.A., at p. 647, thought that s. 18.5 was determinative of the issue because he interpreted it as requiring that a provision had to be "expressly made by an Act of Parliament" before an appeal to the Federal Court, Trial Division could arise. With respect, he misconstrued s. 18.5 since its purpose is to limit the judicial review powers of the Federal Court, Trial Division where a statutory right of appeal exists. Section 18.5 in no way sets down conditions for the creation of statutory appeals from decisions of federal tribunals. The provision which Pratte J.A. should have considered is s. 24(1) of the Act, which states:

> **24.** (1) Except as otherwise provided in this Act or any other Act of Parliament, the Trial Division has exclusive original jurisdiction to hear and determine all appeals that under any Act of Parliament may be taken to the Court. [Emphasis added.]

50 The operative word in this section is "under". If an appeal to the Federal Court, Trial Division is authorized under an Act of Parliament, then that Court has exclusive jurisdiction to hear the appeal.

51 On that basis, the assessment by-laws fall squarely within s. 24(1). The by-laws have the status of regulations as per s. 2(1)(*a*) of the *Interpretation Act*:

> **2.** (1) . . .
>
> "regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (*a*) in the execution of a power conferred by or under the authority of an Act. . . . [Emphasis added.]

52 The appeal procedures in the by-laws are authorized "under" s. 83(3) of the *Indian Act*, which requires that by-laws provide an appeal procedure in respect of assessments made for the purposes of taxation. I find that the provision of an appeal has been taken "under an Act of Parliament", and therefore, the appeal from the appeal tribunals to the Federal Court, Trial Division is consistent with s. 24(1). I therefore reject the argument that the appellant bands have unilaterally extended the jurisdiction of the Federal Court, Trial Division. In my view, the bands have been authorized by Parliament to enact appeal procedures, and to this end have taken advantage of the already existing jurisdiction in s. 24(1) of the *Federal Court Act*.

53 Moreover, Parliament intended the bands to have considerable scope for creating appeal procedures through their by-laws, with the caveat that such procedures would be "subject to the approval of the Minister" (s. 83(1) of the *Indian Act*). All of the by-laws at issue in this case received the approval of the Minister of Indian Affairs and Northern Development. Clearly, the Minister believed that it was *intra vires* the bands to create appeals to the Federal Court, Trial Division. It would be inappropriate for the courts to narrow the scope of possible appeal procedures available to the appellant bands.

(iii) Was it unreasonable for Joyal J. to conclude that the statutory appeal tribunals were a better forum in which to consider at first instance the issue raised by the respondents?

54 Joyal J. and Pratte J.A. engaged in a debate within their respective rulings as to whether the statutory appeal tribunals or the Federal Court, Trial Division, is the preferable forum in which to consider at first instance the issue of whether the respondents' lands are "in the reserve".

55 Joyal J. at p. 93 reasoned as follows:

> . . . I observe that section 18 motions, as for all prerogative writ applications, are heard summarily. It seems to me that a board or court of revision is a better forum to receive and consider all the evidence material to the issue. It is not presumptuous of me to imagine that the respondents have built up some armour to respond to the main thrust of the applicant's case and that the enquiry might be extensive and far-reaching. Whatever the decision below, it is probable that the Federal Court would be called upon to deal with an appeal from it. In that respect, it may be generally stated that the field of enquiry of an appeal court and the remedies available to it are far more extensive than those available in *certiorari* proceedings.

Pratte J.A. disagreed at p. 649:

> . . .while the Judge realized that it would be necessary, in order to answer the questions raised by the appellants, to introduce evidence on complex factual issues, he expressed the view (at p. 93) that since "section 18 motions. . .are heard summarily" the tribunals created under the Assessment By-law were "a better forum to receive and consider all the evidence material to the issue". That opinion does not take into account the fact that those who are appointed to the tribunals created by the Assessment By-law are not likely to have any experience in the difficult task of presiding over a trial and will not be governed by any rules of procedure enabling them to perform that function. That opinion also ignores that, under subsection 18.4(2) (as enacted by S.C. 1990, c. 8, s. 5) of the *Federal Court Act*, the Trial Division may, if an application for judicial review raises complex factual issues, order that it be treated and proceeded with as an action.

56 With respect to both Joyal J. and Pratte J.A., I believe that they may have asked themselves the wrong question. In the case of the adequate alternative remedy principle, the question which should be posed is: Is an appeal tribunal established under s. 83(3) of the *Indian Act* an adequate forum for resolving, at first instance,

the respondents' jurisdictional challenge? This does not necessarily require a finding that the tribunals are a better forum than the courts.

57 Having considered the factors raised by both Joyal J. and Pratte J.A., I find that it was not unreasonable for Joyal J. to conclude that the appeal tribunals are an adequate forum. Whether or not Joyal J. was wrong to conclude that the tribunals are a better forum is irrelevant. As Joyal J. noted, a hearing before the appeal tribunal will allow for a wide-ranging inquiry into all of the evidence. Moreover, although the issues may be complex, to suggest (as Pratte J.A. does) that the appeal tribunals are ill-equipped to consider such issues is contrary to the intention of Parliament, as evidenced by s. 83(3) of the *Indian Act*. When Parliament required bands to establish appeal procedures on both the classification and valuation aspects of the assessment process, Parliament must have believed that the appeal tribunals would be capable of resolving the issues on which they had authority to adjudicate. Otherwise, the existence of a requirement that appeal procedures be established makes no sense.

58 It is interesting to note s. 18.3(1) of the *Federal Court Act*, which states:

> **18.3** (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Trial Division for hearing and determination.

Section 18.3(1) allows an appeal tribunal to seek the guidance of the courts if it encounters legal, procedural or other issues which it cannot resolve.

59 On the basis of my analysis above, I would conclude that it was not unreasonable for Joyal J. to consider the following factors in exercising his discretion:

(1) The appeal tribunals are an adequate forum for considering at first instance the issue raised by the respondents. In particular, it was not unreasonable to conclude that the appeal tribunals would be an adequate forum on the basis that a far-reaching and extensive inquiry could be conducted in which both sides could fully present their evidence and arguments.

(2) The statutory appeal procedure provides to the respondents an appeal from the appeal tribunals to the Federal Court, Trial Division. Effectively, the respondents will be able to bring their case before the Federal Court, Trial Division, which may fully review the findings of the appeal tribunals. Any decision of that Court will have the force of *res judicata*. To deny the respondents judicial review in no way prevents them from obtaining a full judicial examination of the issue of whether their lands are "in the reserve".

(3) The purpose of Parliament in enacting the Indian tax assessment scheme was to promote the development of Aboriginal governmental institutions. It is therefore preferable for issues concerning Indian tax assessment to be resolved within the statutory appeal procedures developed by Aboriginal peoples. In particular, it is preferable that assessment errors be corrected within the institutions of the bands.

60 To summarize so far, I cannot say that Joyal J. based his discretionary decision on irrelevant factors, or that he acted unreasonably in light of the factors he considered. However, it may be that Joyal J. failed to take into account a relevant factor, namely an apprehension of bias in the appeal tribunals, and that this factor

would have led him to a different conclusion had he considered it fully. It is therefore necessary to turn to the issue of bias.

(iv) Is there a reasonable apprehension of bias in the appeal tribunals which would evidence the inadequacy of the statutory appeal procedures?

61 The respondents have submitted before this Court that the statutory appeal procedures are not an adequate alternative to judicial review because the appeal tribunals give rise to a reasonable apprehension of bias. Two sources of bias are alleged:

(1) Members of the bands may be appointed to the appeal tribunals. All members of the band are tax exempt yet enjoy the benefits of taxes spent on the reserve. Therefore a band member on the tribunal would have a direct and personal interest in determining the highest possible assessments to ensure the greatest tax revenue;

(2) Non-Indian members will be concerned about rendering decisions adverse to the interests of the band and its members which could affect them as follows:

(a) they "may" but not "shall" be paid remuneration for their services;

(b) they enjoy no tenure of office and may not be appointed to sit on future assessment appeals.

62 As a preliminary comment, I would note that s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* guarantees to everyone charged with an offence a hearing before an independent and impartial tribunal. Of course, this case does not involve

someone "charged with an offence", so s. 11(*d*) does not apply directly. However, in interpreting s. 11(*d*), this Court has developed important principles on the correct approach which should be taken to issues of bias, and particularly the issues of independence and impartiality. In *Valente v. The Queen*, [1985] 2 S.C.R. 673, Le Dain J. distinguished between these two concepts at p. 685:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. . . . The word `independent' in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

I elaborated upon this in *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 283-84:

> To assess the impartiality of a tribunal, the appropriate frame of reference is the "state of mind" of the decision-maker. The circumstances of an individual case must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be subjectively biased in the particular situation. The question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups.

63 When the respondents allege an apprehension of bias on the basis of band members sitting on the appeal tribunals, they question the <u>appearance of impartiality</u> of these members. When they point to the lack of security of tenure of tribunal members, and the uncertainty as to whether they will receive remuneration, the respondents are questioning the <u>appearance of independence</u> of these members. For this reason, I will deal with the two allegations under the headings of "impartiality" and "independence". I would emphasize that the respondents are not alleging

actual bias. Instead, they are alleging a reasonable apprehension flowing from the institutional structure of the tax assessment appeal tribunals. As was noted in *Valente*, *supra*, judicial independence involves both the individual independence of members of the judiciary, and the institutional independence of the court or tribunal (p. 687). It is the latter which the respondents are questioning here.

(a) *The Impartiality of Band Members Appointed to the Tribunals*

64 I agree with Joyal J. and the appellants that these allegations of bias are speculative. Before the respondents have applied to the appeal tribunals, and before any band members have been appointed to these tribunals, the respondents are asking this Court to find that they cannot obtain an impartial hearing.

65 In *R. v. Lippé*, [1991] 2 S.C.R. 114, I considered the question of institutional impartiality. I stated there, at p. 140,

> Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognized by this Court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect. . .so too must the requirement of judicial impartiality.
>
> . . .
>
> Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.

66 The respondents' allegations involve institutional impartiality. The fact that band members may be appointed to appeal tribunals is, in the submission of the

respondents, a structural flaw which results in a reasonable apprehension of bias.

67 Given that structural impartiality is challenged by the respondents, I would apply the principles elaborated in *Lippé*, *supra*, at p. 144 modified for this case:

> Step One: Having regard for a number of factors including, but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them, will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?
>
> Step Two: If the answer to that question is no, allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis.

68 In this case, the answer to the first question is clearly no, and therefore there is no apprehension of bias flowing from the want of structural impartiality. I offer two reasons.

69 First, in challenging the possibility of the appointment of band members to the appeal tribunals, the respondents are suggesting that because these members have a stake in the economic health of the community yet pay no taxes, they may be biased. In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J. discussed the composition of boards in the context of bias at p. 635:

> The composition of boards can, and often should, reflect all aspects of society. Members may include the experts who give advice on the technical nature of the operations to be considered by the board, as well as representatives of government and of the community. There is no reason why advocates for the consumer or ultimate user of the regulated product should not, in appropriate circumstances, be members of boards. No doubt, many boards will operate more effectively with representation from all segments of society who are interested in the operations of the Board. [Emphasis added.]

70 It is therefore appropriate to have a member of the band sit on an appeal tribunal in order to reflect community interests. Moreover, the allegation that band members have an economic interest in imposing higher tax assessments (because they pay no taxes) is speculative. It could as easily be said that band members have an interest in keeping property taxes low in order to attract investment, since taxation powers can be used both to raise revenues and to promote economic development.

71 Second, in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, the appellant alleged that there existed a reasonable apprehension of bias on the basis that the Benchers on the Judicial Committee of the Manitoba Law Society had an indirect pecuniary interest in the outcome of the disciplinary proceedings. This was because the *Law Society Act* allowed the costs of an investigation into professional misconduct to be awarded against a lawyer who is found guilty. The appellant reasoned that the Law Society had a pecuniary interest in finding him guilty in order to recoup the costs of its investigation, and thereby reduce bar fees. Iacobucci J. adopted a functional approach, reasoning that the allegation had to be examined within the wider context provided by the Manitoba *Law Society Act* and the experience of self-governing professions generally. He stated the test, at p. 890, as follows: "Would the perceived pecuniary interest that the members of the Judicial Committee are alleged to have in a finding of guilt .

. . create an apprehension in a reasonably well-informed person that the Judicial Committee might not decide fairly?" He reached the following conclusion at pp. 891-92 which is relevant to the case at bar:

> . . .any pecuniary interest that the members of the Judicial Committee might be alleged to have is far too attenuated and remote to give rise to a reasonable apprehension of bias. Costs recouped pursuant to s. 52(4) become the property of the Law Society as a whole, and in no way do they accrue to the individual members of the committee who determined that the charge of misconduct was in fact well founded. As such, there is no personal and distinct interest on the part of the Judicial Committee members.

I agree with this reasoning and would apply it in this case.

72 There is clearly an important interest in having band members sit on appeal tribunals. The concern that these members might be inclined to increase taxes in order to maximize the income flowing to the band is simply too remote to constitute a reasonable apprehension of bias at a structural level. More to the point, the income raised through the tax assessment scheme does not accrue to any individual, but rather to the community as a whole. There is, as Iacobucci J. stated at p. 892, "no personal and distinct interest on the part of" tribunal members. In my view, the potential for conflict between the interests of members of the tribunal and those of parties appearing before them is, at this stage, speculative. Therefore, it cannot be said that a reasonable apprehension of bias would exist in the mind of a fully informed person in a substantial number of cases. Any allegations of bias which might arise must be dealt with on a case-by-case basis, as I suggested in *Lippé, supra*.

(b) *The Independence of Tribunal Members*

73 Thus, I am left with the allegation that a reasonable apprehension of bias exists because tribunal members may not be paid, lack security of tenure, and are appointed by the Band Chiefs and Councils. It is here that I part company with my colleague Sopinka J. In my opinion, the respondents' submissions concerning institutional independence raise serious questions about the structure of the appeal tribunals established by the appellant bands. These questions cannot be avoided by simply deferring to Joyal J.'s exercise of discretion. The issue of bias was raised before Joyal J., and was argued before both the Federal Court of Appeal and this Court. If the bands' tribunals lack sufficient institutional independence, then this is a relevant factor which must be taken into account in determining whether the respondents should be required to pursue their jurisdictional challenge before those tribunals.

74 Moreover, while I agree that the larger context of Aboriginal self-government informs the determination of whether the statutory appeal procedures established by the appellants constitute an adequate alternative remedy for the respondents, I cannot agree with Sopinka J.'s conclusion that this context is relevant to the question of whether the bands' tribunals give rise to a reasonable apprehension of bias at an institutional level. In my view, principles of natural justice apply to the bands' tribunals as they would apply to any tribunal performing similar functions. The fact that the tribunals have been constituted within the context of a federal policy promoting Aboriginal self-government does not, in itself, dilute natural justice. The Indian Taxation Advisory Board, which intervened before this Court on behalf of the appellant bands, has itself determined that appeal tribunals constituted under s. 83(3) of the *Indian Act* must comply with the principles of natural justice. I would cite the following excerpt from the Board's *Introduction*

to Real Property Taxation on Reserve (1990), at p. 23, a manual designed to assist Aboriginal bands in establishing their taxation tribunals:

> Subsection 83(3) of the *Indian Act* requires taxation by-laws to provide "an appeal procedure in respect of assessments made for the purposes of taxation". A statutory right of appeal is fundamental to any tax assessment process for two reasons. First, the nature of the assessment process is such that an assessment decision is made only on the strength of an assessor's judgment, without any prior hearing providing input from the party assessed. Second, a fundamental rule of the common law relating to administrative procedures, like assessments, is that everyone has a right to a hearing where matters are involved affecting that person's liberty or property rights. This rule is derived from the principles of natural justice, which are fundamental principles of administrative law that basically ensure (i) a person's right to a hearing and (ii) that the person is heard by an impartial tribunal.
>
> . . .
>
> The *Indian Act* does not detail the types of appeal processes that councils should establish in their taxation by-laws. However, whatever appeal mechanisms are put in place they will have to adhere to the principles of natural justice, since, as mentioned above, the appeal is in effect a subsequent hearing. [Emphasis added.]

With respect, I do not believe that either *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, or *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, the cases cited by Sopinka J., support the view that the policy of Aboriginal self-government is relevant to a determination of whether the appellant Band's taxation tribunals comply with the principles of natural justice.

75 I begin my analysis of the institutional independence issue by observing that the ruling of this Court in *Valente*, *supra*, provides guidance in assessing the independence of an administrative tribunal. There, Le Dain J. considered whether provincial court judges were independent. He pointed to three factors which must be satisfied in order for independence to be established: security of tenure, security of remuneration and administrative control.

76 The two factors which are raised in this case are security of tenure and security of remuneration. On the subject of security of tenure, Le Dain J. wrote, at p. 698, that the essentials of security of tenure include:

> . . .that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

In terms of security of remuneration, or "financial security", he wrote, at p. 704:

> The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

77 The essential point, according to Le Dain J. at p. 706, is that the right to salary must be established by law, and that there must be no way in which the Executive could interfere with that right so as to affect the independence of the individual judges.

78 As noted above, Le Dain J. was writing in the context of s. 11(*d*) of the *Charter*, which applies only where a person is charged "with an offence". However, several Federal Court of Appeal decisions have found the *Valente* principles to be applicable in the case of administrative tribunals. See, for example, *MacBain v. Lederman*, [1985] 1 F.C. 856, at pp. 869-71; *Sethi v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 552, at pp. 558-59; and *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363, at pp. 386-87.

79 This Court has considered *Valente, supra*, in at least one case involving an administrative tribunal, *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, in which the independence of the Ontario Labour Relations Board was at issue. There, Gonthier J. stated at p. 332:

> Judicial independence is a long standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection.

80 I agree and conclude that it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in *Valente* are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted. In *Valente, supra*, Le Dain J. wrote, at pp. 692-93,

> It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. . . .The essential conditions of judicial independence for purposes of s. 11(*d*) must bear some reasonable relationship to that variety.

I reached a similar conclusion in *Généreux, supra*, at pp. 284-85.

81 The classic test for a reasonable apprehension of bias is that stated by 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 Mr. Crowe, whether consciously or unconsciously, would not decide fairly".

De Grandpré J. further held that the grounds for the apprehension must be "substantial".

82 The decision in *Committee for Justice and Liberty* confirms, at p. 395, that a more flexible approach should be taken in applying the test for bias in the context of administrative tribunals:

> The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in light of its experience and of that of its technical advisers.
>
> The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. As stated by Reid, *Administrative Law and Practice*, 1971, at p. 220:
>
> > . . .`tribunals' is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.
>
> To the same effect, the words of Tucker L.J. in *Russell v. Duke of Norfolk and others*, [1949] 1 All E.R. 109, at p. 118:
>
> > There are, in my view, no words which are of a universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.
>
> In the case at bar, the test must take into consideration the broad functions entrusted by law to the Board. . . .

83 Therefore, while administrative tribunals are subject to the *Valente* principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.

84 In some cases, a high level of independence will be required. For example, where the decisions of a tribunal affect the security of the person of a party (such as the Immigration Adjudicators in *Mohammad*, *supra*), a more strict application of the *Valente* principles may be warranted. In this case, we are dealing with an administrative tribunal adjudicating disputes relating to the assessment of property taxes. In my view, this is a case where a more flexible approach is clearly warranted.

85 I would therefore apply this approach to the question of whether the members of the appellants' appeal tribunals are sufficiently independent. The *Valente* principles must be considered in light of the nature of the appeal tribunals themselves, the interests at stake, and other indices of independence, in order to determine whether a reasonable and right-minded person, viewing the whole procedure as set out in the assessment by-laws, would have a reasonable apprehension of bias on the basis that the members of the appeal tribunals are not independent.

86 It is first necessary to examine the provisions of the assessment by-laws dealing with the powers of appeal tribunals and the appointment and remuneration of their members. For this purpose, the by-laws of the Matsqui and Siska bands will be considered. It should be noted that the Siska By-law is identical to those of the other five appellant bands.

87 Two levels of appeal are established by the Matsqui By-law: the Court of Revision and the Assessment Review Committee.

Matsqui -- Court of Revision

88 Section 27 of the Matsqui By-law, entitled "Establishment of Courts of Revision", states:

> (A) The Chief and Council shall by Band Council resolution each year appoint Courts of Revision to hear appeals on assessments of land and improvements.
>
> (B) Notwithstanding the provisions of subsection (A), the Chief and Council may appoint one or more special Courts of Revision, comprised of persons experienced in agriculture, to hear complaints in respect of the classification, or refusal of classification, of land as a farm.
>
> (C) The members of a Court of Revision shall be paid their reasonable and necessary travelling and out of pocket expenses incurred in carrying out their duties and in addition may be paid reasonable remuneration.
>
> (D) Every member of the Court of Revision, before entering on his duties, shall take and subscribe the oath as attached in Schedule 10.

89 Schedule 10 of the By-law includes the oath which Court of Revision members must take:

> I, _____, do solemnly swear (or affirm) that I will, to the best of my judgment and ability, and without fear, favour or partiality, honestly decide the complaints to the Court of Revision which may be brought before me for trial as a member of said Court.

The powers of the Courts of Revision are listed in s. 32:

> (A) The powers of a Court of Revision constituted under this By-law are
>
> (1) to meet at the dates, times, and places appointed, and to try all complaints delivered to the assessor under this By-law;
>
> (2) to investigate the assessment roll and the various assessments made in it, whether complained against or not, and subject to subsections (D) and (F), to adjudicate on the assessments and complaints so that the assessments shall be fair and equitable and fairly represent actual values within the municipality or rural area;
>
> (3) to direct amendments to be made in the assessment roll necessary to give effect to its decisions; and
>
> (4) to confirm the assessment roll, either with or without amendment.
>
> . . .
>
> (G) The Court of Revision shall appoint a chairman, who shall preside at all meetings and who may, unless otherwise provided by the Court of Revision, call meetings and regulate procedure.
>
> . . .
>
> (J) All questions before the Court of Revision shall be decided by a majority of the members present and the chairman votes as an ordinary member of the Court of Revision.

Matsqui -- Assessment Review Committee

Section 49 (A) of the By-law states:

> (A) Where a person, including the Band, the commissioner, or the assessor, is dissatisfied with the decision of a Court of Revision, or with the omission or refusal of the Court of Revision to hear or determine the complaint on the completed assessment roll, he may appeal from the Court of Revision to the Committee.

Section 35 deals with the establishment of the Assessment Review Committee:

(A) The Chief and Council by Band Council Resolution shall each year establish an Assessment Review Committee which shall consist of:

(1) one person who is or was duly qualified to practise law in the Province of British Columbia, or who is or was a Judge of a Provincial or Supreme Court in the Province of British Columbia;

(2) one person who has sat as member of an appeal committee to review assessments in and for the Province of British Columbia;

(3) one person who is a member of the Matsqui Indian Band or who is an agent of the Band who does not have any conflict of interest in any real property assessment to which an appeal relates, as set out in section 41; and

(4) notwithstanding anything above stated in this section, one of the above three persons shall be an accredited appraiser or a retired accredited appraiser.

(B) The Chief and Council shall establish the terms of appointment, duties and remuneration of members.

(C) A member of the Committee shall be paid his reasonable travelling and out of pocket expenses for his attendance to hear appeals or at any meeting of the Committee.

Siska -- Board of Review

90 Unlike Matsqui's By-law, which establishes two levels of appeal, Siska's By-law establishes only one appeal tribunal, the "Board of Review". Section 40 outlines the composition of the Board:

40. (1) Notwithstanding any other by-law, the chief and council shall appoint Boards of Review to hear appeals on assessments of land and improvements located on the reserve.

(2) A Board of Review shall consist of three members, only one of which may be a member of the Siska Indian Band.

(3) The members of a Board of Review shall be paid their reasonable and necessary travelling and out of pocket expenses incurred in carrying out their duties and in addition may be paid remuneration as may be ordered by the chief and council.

> (4) Every member of a Board of Review shall, before entering on his duties, take and subscribe before the administrator or a notary Public or a commissioner for taking oaths an oath or affirmation in the form prescribed by this by-law in Schedule "C".

The oath referred to in s. 40(4) of the Siska by-law is identical to the Matsqui oath quoted above.

91 The powers of the Board of Review, as listed in s. 45(1), include:

> (a) to meet at the dates, times, and places appointed, and to try all complaints delivered to the assessor under this by-law;
>
> (b) to adjudicate on the appealed assessment so that the assessment shall be fair and equitable and fairly represent actual values within the reserve;
>
> (c) to direct amendments to be made in the assessment roll necessary to give effect to its decisions; and
>
> (d) to confirm the assessment roll, either with or without amendment.

92 I have quoted these excerpts from the bands' by-laws to demonstrate that members of the appeal tribunals perform adjudicative functions not unlike those of courts. However, members of the Siska Board of Review and the Matsqui Court of Revision have no guarantee of salary. Under the Matsqui By-law, members of the Court of Revision "may" receive remuneration, while the Siska By-law also uses permissive language.

93 On the subject of security of tenure, the Matsqui tribunals are to be appointed each year, although the terms of appointment are to be left to the Chief and Band Council. One might presume that the members of the tribunals are appointed for one-year terms; however, there is nothing in the Matsqui By-law protecting

members from arbitrary dismissal mid-term. The Siska By-law is silent on all aspects of the appointment of tribunal members.

94 This raises some serious concerns. For example, under the By-laws, there is nothing to prevent the Band Chiefs and Councils from paying tribunal members only after they have reached a decision in a particular case, or not paying the members at all. The Siska Band could, if it wished, appoint tribunal members on an ad hoc basis, since there is no requirement that members be appointed for a specific term. Siska could then refuse to re-appoint members who reached decisions contrary to the interests of the band. In all cases, it would appear that tribunal members may be removed from their positions at any time by the bands, which leaves open the possibility of considerable abuse.

95 A further factor contributing to an apprehension of insufficient institutional independence arises when one considers that the Chiefs and Band Councils select the members of their tribunals, in addition to controlling their remuneration and tenure. This fact contributes to the appearance of a dependency relationship between the tribunal and the band, particularly in the case at bar where the interests of the band are clearly at odds with the interests of the respondents. In fact, both the Matsqui and Siska by-laws allow the bands themselves to be parties before their respective tribunals (s. 49 (A) of the Matsqui By-law and s. 41(4) of the Siska By-law). The respondents are thus faced with presenting their case before a tribunal whose members were appointed by the very Band Chiefs and Councils who oppose their claim. This raises a problem similar to that addressed in *MacBain, supra*. In that case, the Federal Court of Appeal found a reasonable apprehension of bias where the prosecutor of the human rights infringement (i.e.

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

96 The appellants rely heavily on the fact that members of the appeal tribunals are required to take an oath of office that they will be impartial. This is one factor to take into account in assessing the independence of an administrative tribunal. However, the fact that an oath is taken cannot act as a substitute for financial security or security of tenure. The *Valente* principles are flexible in their application to administrative tribunals, but they cannot be ignored.

97 Similarly, the fact that the interest at stake in the case, tax assessment, is of a lesser form than interests like the one identified in *Sethi*, *supra*, (i.e., security of the person) is a consideration in applying the *Valente* principles. Again, however, I am not prepared to discard the *Valente* principles on the basis that the property interests implicated in this case are not as important as other interests.

98 In my view, even a flexible application of the *Valente* principles leads to the inevitable conclusion that a reasonable and right-minded person, viewing the whole procedure in the assessment by-laws, would have a reasonable apprehension that members of the appeal tribunals are not sufficiently independent. Three factors lead me to this conclusion:

(1) There is a complete absence of financial security for members of the tribunals;

(2) Security of tenure is either completely absent (in the case of Siska), or ambiguous and therefore inadequate (in the case of Matsqui);

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

99 In reaching this conclusion, I wish to emphasize that it is these three factors in combination which lead me to the conclusion that the appeal tribunals lack sufficient independence in this case. I am not saying that any one of these factors, considered in isolation, would have led me to the same conclusion. For example, most of the provincial tax assessment appeal tribunals are appointed by the provincial government, rather than by the municipalities. (Reference may be made to: Prince Edward Island's Island Regulatory and Appeals Commission (*Island Regulatory and Appeals Commission Act*, S.P.E.I. 1991, c. 18); New Brunswick's Regional Assessment Review Board (*Assessment Act*, R.S.N.B. 1973, c. A-14, as amended); Nova Scotia's Regional Assessment Appeal Courts (*Assessment Act*, R.S.N.S. 1989, c. 23); Quebec's Board of Revision (*Municipal Taxation Act*, S.Q. 1979, c. 72); Ontario's Assessment Review Board (*Assessment Review Board Act*, R.S.O. 1990, c. A.32); Saskatchewan's Municipal Board (*Municipal Board Act*, S.S. 1988-89, c. M-23.2, as amended); Alberta's Assessment Appeal Board (*Assessment Appeal Board Act*, R.S.A. 1980, c. A-46); British Columbia's Court of Revision and Assessment Appeal Board (*Assessment Act*, R.S.B.C. 1979, c. 21, as amended). Although Newfoundland's Assessment Review Commissions are

appointed by municipal councils, all appointments must be approved by the Minister of Municipal and Provincial Affairs (*Assessment Act*, R.S.N. 1990, c. A-18).)

100 These provincial regimes effectively address the third problem with the band tribunals noted above, since a different level of government is making the tribunal appointments than the level whose interests are directly at stake in proceedings before that tribunal. I am satisfied that such tribunals have sufficient independence, even where other indices of independence such as security of tenure or security of remuneration are not guaranteed in the statute authorizing the creation of the tribunal.

101 Of course, Indian bands may be reluctant to cede the power to appoint tribunal members to the federal government, given that one of the purposes of the new tax assessment regime is to facilitate the development of Aboriginal self-government. Thus, to conform to the requirements of institutional independence, the appellant bands' by-laws will have to guarantee remuneration and stipulate periods of tenure for tribunal members. The by-laws will also have to ensure that members may only be dismissed during their tenure "with cause".

102 One final matter concerning the bias issue should be addressed. The appellants argued before this Court that all the allegations of bias raised here were speculative. Sopinka J. adopts this position. While I agree that the allegations concerning an absence of institutional impartiality are premature, I disagree that this necessarily results in the allegations surrounding institutional independence being premature as well. The two concepts are quite distinct. It is mere

speculation to suggest that members of the tribunals will lack impartiality, since we cannot possibly know in advance of an actual hearing what these members think. The mere fact that the structure of the tribunals allows band members to sit on appeals tells us nothing (unless we assume that all band members are biased, which is clearly not correct). However, in assessing the institutional independence of the appeal tribunals, the inquiry focuses on an objective assessment of the actual structure of the tribunals. We can examine the by-laws, apply the *Valente* principles, and reach a conclusion. This kind of analysis is hardly speculative, since the by-laws are conclusive evidence that the tribunals are not sufficiently independent from the Band Chiefs and Councils.

103 My colleague Sopinka J. does not dispute that institutional independence is a principle of natural justice which applies to the band tribunals. He argues, however, that institutional independence should be assessed in the context of an actual tribunal hearing, thereby taking the position that institutional independence could arise in the circumstances of the appointment of the tribunal members, or in the manner in which the tribunals conduct their hearings.

104 With respect, I cannot agree. The function of institutional independence is to ensure that a tribunal is <u>legally structured</u> such that its members are reasonably independent of those who appoint them. My colleague Sopinka J. appears to be of the view that it is possible for the appellant bands to exercise their discretion under the by-laws with respect to financial and tenure matters in such a way that the fundamental inadequacies of the by-laws will be cured. With respect, it is always possible for discretion to be exercised consistent with natural justice. The problem is the discretion itself, since the point of the institutional independence doctrine is to ensure that tribunal independence is not left to the

discretion of those who appoint the tribunals. It is, in my opinion, inconsistent to concede that institutional independence applies in this case, yet go on to conclude that the lack of institutional independence in the by-laws may be addressed through the exercise of the discretionary powers granted to the Band Chiefs and Councils under the by-laws. Institutional independence and the discretion to provide for institutional independence (or not to so provide) are very different things. Independence premised on discretion is illusory.

V. Conclusion

105 Joyal J., in the Federal Court, Trial Division, did not consider irrelevant factors, nor did he reach an unreasonable conclusion on the basis of the factors which he did consider. However, he erred in exercising his discretion by failing to take into account the fact that the appeal tribunals established under s. 83(3) of the *Indian Act* lack sufficient independence from the Band Chiefs and Councils. Had Joyal J. considered this factor, he would have concluded that the appeal tribunals are not an adequate alternative remedy, and would therefore have exercised his discretion in favour of undertaking judicial review as sought by the respondents. As was stated in *Canada (Auditor General)*, *supra*, at p. 96, ". . .the courts should not bow before inadequate relief for citizens' statutory and common law rights".

106 I would dismiss the appeal, with costs to the respondents.

The following are the reasons delivered by

//*La Forest J.*//

107 LA FOREST J. -- I have read the reasons of my colleagues, and agree with the conclusion of the Chief Justice and Justice Major that the appeal should be dismissed with costs. I do so for the following reasons. I agree with the Chief Justice that the Federal Court, Trial Division and the appeal tribunals established under s. 83(3) of the *Indian Act*, R.S.C., 1985, c. I-5, have concurrent jurisdiction to address the question whether the respondents' land is "in the reserve". However, in my view, Joyal J. did not exercise his discretion in a proper manner in deciding that the band appeal tribunal system constitutes an adequate alternative remedy in this context. The determination whether the respondents' land is "in the reserve" is a jurisdictional question that brings into play discrete and technical legal issues falling outside the specific expertise of the band appeal tribunals. It is ultimately a matter within the province of the judiciary. Since any decision by a band appeal tribunal regarding this question will lack the force of *res judicata*, and will be reviewable by the Federal Court, Trial Division on a standard of correctness, it seems clear that the band appeal procedure is not an adequate remedy. The respondents should, therefore, be allowed the opportunity to have this jurisdictional question determined with the force of *res judicata* by the Federal Court at the outset without being compelled to proceed through a lengthy, and possibly needless, band appeal process.

108 I find it unnecessary to consider the other issues raised in this appeal.

The reasons of L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ. were delivered by

//*Sopinka J.*//

109 SOPINKA J. (dissenting) -- I agree with the Chief Justice on all issues, except for his analysis of the issue of lack of institutional independence as a ground for finding that Joyal J. erred in exercising his discretion to refuse judicial review. My reasons are restricted to this issue. In my view, Joyal J. did not err in exercising his discretion to find that the band taxation tribunals were an adequate alternative remedy and that allegations of bias were premature. I would, therefore, allow the appeal and reinstate his judgment.

110 I have four reasons for finding that Joyal J. did not err in exercising his discretion:

(1) the matter was not properly raised at first instance;

(2) appellate courts should defer to a proper exercise of discretion;

(3) the Aboriginal self-government context is relevant to assessing institutional independence; and,

(4) cases have assessed the institutional independence issue by considering the practice of the tribunal as depicted in the context of an actual hearing.

1. Argument Regarding Bias before Joyal J.

111 At first instance, Joyal J. rejected as premature the argument of the respondents, Canadian Pacific Limited ("CP") and Unitel Communications Inc., regarding reasonable apprehension of bias. I quote from Joyal J.'s reasons for judgment, at p. 91:

> It is true, as pointed out by applicant's counsel, that the first group of by-laws to which I have referred provides in section 40(2) that boards of review shall consist of three members, only one of whom may be a member of the Indian band. Counsel argues bias. At best, this is a premature argument, no evidence being before me as to the composition of any board of review. [Emphasis in original.]

The issue of reasonable apprehension of bias was raised before Joyal J. in oral argument and was not part of the originating notice of motion. Additionally, that oral argument seems to have related only to institutional impartiality and not to institutional independence. Joyal J. thus did not err in finding that there was an insufficient factual foundation for the allegation.

2. Appellate Deference to Exercise of Discretion

112 Joyal J. at first instance exercised his discretion and chose to strike out the respondents' application for judicial review on the ground that there was an alternate adequate remedy under the band taxation by-laws. As noted by the Chief Justice's reasons in this appeal, the discretionary nature of judicial review was recognized in the adequate alternative remedies context, by both the majority and dissenting judgments in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, respectively, at pp. 574-76 and 610-11. It is well-established that appellate courts must defer to the exercise of such discretion unless the conclusion is unreasonable, or has been reached on the basis of irrelevant or erroneous considerations, a wrong principle, or as a result of insufficient or no weight having been given to a relevant consideration. The discretion to exercise judicial review is not being assessed *de novo* in this Court. I refer to the following statement of Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130, at p. 138, cited with

approval by La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 76:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

Unlike the Chief Justice, I cannot say that, in the circumstances, Joyal J. erred in declining to consider the question of reasonable apprehension of lack of institutional independence at this stage. In the balance of these reasons, I will canvass other factors in order to determine whether there exists any basis upon which this Court can review the exercise of discretion.

3. Relevance of Self-Government Context

113 As the Chief Justice has noted, the essential conditions of institutional independence set out by Le Dain J. in *Valente v. The Queen*, [1985] 2 S.C.R. 673, in the judicial context need not be applied with the same strictness in the case of administrative tribunals. Conditions of institutional independence must take into account their context.

114 In this appeal, a very significant contextual factor is that the band taxation scheme, under the *Indian Act*, R.S.C., 1985, c. I-5, as amended, is part of a nascent attempt to foster Aboriginal self-government. This was considered by Joyal J., at first instance, as follows, at pp. 91-92:

> Although there is no direct evidence on the point, there is another aspect to this case which deserves mention. It is obvious, from an examination of all the material before me, that the whole legislative scheme found in the Indian band by-laws reflects extremely important policy issues. One need not be a participant in the scheme to observe the departure from long-established norms respecting the taxing of lands and improvements on Indian reserves. One can also presume that intensive discussions took place between public authorities in British Columbia, the federal authorities at Ottawa and, for that matter, the Indian bands concerned, in setting up an elaborate system of assessment and taxation. I conclude that effectively, the provincial authorities, as a policy matter, have relinquished their historical field of taxation over reserve lands and, with the collaboration of the federal authorities in giving the force of law to the by-laws pursuant to section 83 of the *Indian Act*, have clothed the respective Indian band councils with the mantle of legitimacy in running their own system of taxation. It leads me to conclude that for purposes of settling the issue before me, it would not be in the public interest and it would not favour public policy at this time to bypass the appeal provisions in the by-laws.

The Chief Justice has stated that this context was reasonably taken into account by Joyal J. respecting the band taxation appeal procedures. In my view, this same contextual consideration also applies to assessing Joyal J.'s conclusion that the bias issue was premature. The self-government policy context is relevant to the entire exercise of judicial discretion. In this regard, it is pertinent to refer to the principle of statutory interpretation set forth by Dickson J. (as he then was) in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36, a case involving interpretation of the *Indian Act* tax exemption rights:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes

> relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

This principle was affirmed by La Forest J. in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 143, also in the tax exemption rights context :

> . . .it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them.

115 These are broad, general interpretive principles and they apply equally to assessing institutional bias on the face of band taxation tribunal by-laws established under s. 83 of the *Indian Act* as they do to directly interpreting the *Indian Act*. Accordingly, before concluding that the by-laws in question do not establish band taxation tribunals with sufficient institutional independence, they should be interpreted in the context of the fullest knowledge of how they are applied in practice.

4. Relevance of the Practice of a Tribunal as Depicted in the Context of an Actual Hearing in Order to Assess Institutional Independence

116 I agree with the Chief Justice that the *Valente*, *supra*, principles are to be applied in the context of the test that applies in determining impartiality, that is, whether a reasonable and right-minded person would have a reasonable apprehension of bias. I also agree that the hypothetical reasonable, right-minded person must view the matter on the basis of being provided with the relevant information. In this regard, the judgment of de Grandpré J. in *Committee for*

Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394, which was approved in *Valente*, *supra*, referred to "reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information".

117 The difference between us in this regard is that, while the Chief Justice would limit the information to the procedure set out in the by-laws, I would defer application of the test so that the reasonable person will have the benefit of knowing how the tribunal operates in actual practice. That the principles of natural justice are flexible and must be viewed in their contextual setting has become almost a trite observation. As de Grandpré J. stated in *Committee for Justice and Liberty*, *supra*, at p. 395:

> The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. As stated by Reid, *Administrative Law and Practice*, 1971, at p. 220:
>
> > . . . `tribunals' is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.
>
> To the same effect, the words of Tucker L.J. in *Russell v. Duke of Norfolk and others*, [1949] 1 All E.R. 109, at p. 118:
>
> > There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

Similarly, in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 897, the majority reasons noted:

> It is therefore necessary to examine the nature of the proceedings before the Commission in order to determine whether it was required to comply with the full panoply of the rules of natural justice or was required rather to accord procedural fairness to the appellant.

I do not disagree with the Chief Justice that the band taxation tribunals must comply with the principles of natural justice, but without a clear understanding of the relevant, operational context, these principles cannot be applied.

118 In my view, this approach is consistent with cases that have applied this test in determining both institutional impartiality and independence. In the seminal *Valente* case on judicial independence, Le Dain J. stated, at p. 689:

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. [Emphasis added.]

119 In considering institutional impartiality, in *R. v. Lippé*, [1991] 2 S.C.R. 114, Lamer C.J. considered a number of potential conflicts that could arise when a part-time judge is engaged in another occupation (likely practising law) (p. 144), but flexibly noted the steps taken by judges to render themselves more independent and impartial, such as living in different municipalities, working in specialized practice areas, and taking an oath of office (p. 151). This analysis of the actual

context and operation of the part-time judge's office permitted Lamer C.J. to find that the system would not give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed person. Similarly, in another institutional impartiality case, Iacobucci J., writing for this Court, assessed the wider context provided by the *Law Society Act* and the experience of self-governing professions generally, in determining whether there was a reasonable apprehension of bias on the basis that Benchers on the Judicial Committee of the Law Society had an indirect pecuniary interest in the outcome of disciplinary proceedings: *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at pp. 884-94. While these two cases involved institutional impartiality, the relationship between impartiality and independence, even in the traditional judicial context, is a close one. See Le Dain J. in *Valente*, *supra*, at p. 685. The significance of the theoretical distinction would appear to hold still less weight in the administrative tribunals context.

120 The practice of a tribunal in the context of an actual hearing was used to assess institutional independence in *Alex Couture Inc. v. Canada (Attorney-General)* (1991), 83 D.L.R. (4th) 577 (Que. C.A.), leave to appeal refused, [1992] 2 S.C.R. v. The Quebec Court of Appeal considered the institutional independence of the Competition Tribunal in relation to the strict judicial standard. Applying the principles established by this Court in *Valente*, *supra*; *Committee for Justice and Liberty*, *supra*; and *R. v. Lippé*, *supra*, Rousseau-Houle J.A., writing for the Court of Appeal, considered (i) the statutory scheme on its face; (ii) the actual appointment terms (at p. 664), financial security (at p. 666), and connection to the executive branch of government (at pp. 668-71) for each of the individual

lay members of the Competition Tribunal; and (iii) the administrative policy respecting, *inter alia*, remuneration of tribunal members (at p. 668).

121 In the human rights context, in *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.), the impugned human rights tribunal had considered an alleged employment sex discrimination complaint. In that case, when the Federal Court of Appeal considered institutional bias, it did so on the basis that the human rights tribunal had actually been constituted (indeed, it had decided the case), and noted the procedure of "short listing" prospective tribunal members (at pp. 865-66). In finding a reasonable apprehension of institutional bias where there was a direct connection between the Commission as prosecutor and appointment of the tribunal which heard the case, Heald J. noted the importance of both the scheme of the legislation and how that legislation operated in practice (at p. 872):

> I think it clear from this passage that in the view of Collier J. a "properly informed person" was one who was knowledgeable about the scheme of the statute and was also knowledgeable as to the way in which that scheme was applied in the processing of the complaint at bar. Accordingly, I do not think he failed to properly apply the *Crowe* test. [Emphasis added.]

122 An immigration case, *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363 (C.A.), dealt with the institutional independence of adjudicators conducting immigration inquiries. The Court of Appeal held that a reasonable person would perceive sufficient institutional distance from the executive branch of government. Heald J. considered a range of operational facts and circumstances including: the chain of command from the Minister to the individual adjudicator, legal direction, monitoring, security of

tenure, the collective bargaining unit, transfer arrangements, and scheduling of cases.

123 Case law has thus tended to consider the institutional bias question after the tribunal has been appointed and/or actually rendered judgment. That institutional independence must be considered "objectively" does not preclude considering the operation of a legislative scheme which creates an administrative tribunal, but only vaguely or partly sets out the three *Valente* elements, as in this appeal, where the taxation by-laws in issue are silent with regard to details relating to tenure and remuneration. It is not safe to form final conclusions as to the workings of this institution on the wording of the by-laws alone. Knowledge of the operational reality of these missing elements may very well provide a significantly richer context for objective consideration of the institution and its relationships. Otherwise, the administrative law hypothetical "right- minded person" is right-minded, but uninformed. Although in this appeal, information regarding the appointment of a tribunal was not provided and it is unclear whether the tribunal members who are to hear the taxation assessment appeal have even been designated, tenure and remuneration may be established by the bands on appointment of the taxation tribunals.

Disposition

124 Having established that institutional independence is often assessed by considering the practice of a tribunal as depicted in the context of an actual hearing, I cannot say that Joyal J. should have considered the issue of institutional independence at first instance. Thus, in conjunction with the other factors properly

considered by Joyal J. in exercising his discretion (noted in the Chief Justice's reasons), I hold that Joyal J. did not err in finding that the issue of bias was premature, and refusing to exercise his discretion to take judicial review.

125 I would thus allow the appeal, set aside the judgment of the Federal Court of Appeal, and reinstate the Order of Joyal J. in the Federal Court, Trial Division. The appellants are entitled to their costs in this Court and in the Federal Court of Appeal.

The reasons of McLachlin and Major JJ. were delivered by

//*Major J.*//

126 MAJOR J. -- I have had the opportunity to read the Chief Justice's reasons in this case, and while I agree with his conclusion that this appeal be dismissed with costs, it is for different reasons.

127 I agree with the appellants' submission that the assessment review board has jurisdiction to determine all questions relating to the valuation of land "within the reserve", but I also believe that such boards have no jurisdiction to determine whether a parcel of land is "within the reserve". The property in this appeal involved a right of way through the reserve to which the respondent has held a separate title for more than 100 years.

128 Assessment review boards, as creatures of statute, have only that jurisdiction granted to them by their enabling legislation, which in this case is s.

83 of the *Indian Act*, R.S.C., 1985, c. I-5, as amended, and the various by-laws enacted pursuant to this section. Section 83 of the *Indian Act* reads:

> **83.** (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,
>
> (*a*) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess, or use land in the reserve;
>
> . . .
>
> (3) A by-law made under paragraph (1)(*a*) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph. [Emphasis added.]

129 Section 41 of the *Assessment By-law* of the Siska Indian Band (which is typical of the Assessment By-Laws at issue in this case) reads:

> 41.(1) Where a person is of the opinion that an error or omission exists in the completed assessment roll in that
>
> (a) the name of a person has been wrongfully inserted in, or omitted from, the assessment roll;
>
> (b) land and improvements within the reserve have been wrongfully entered on, or omitted from, the assessment roll;
>
> (c) land and improvements have been valued at too high or too low an amount;
>
> (d) land and improvements have been improperly classified;
>
> (e) an exemption has been improperly allowed or disallowed,
>
> he may personally, or by a written notice signed by him, or by a solicitor, or by an agent authorized by him in writing, together with a fee of $25.00 per roll entry, payable to the Siska Indian Band, come before, or notify, the Board of Review and make his complaint of the error or omission, and may in general terms state his ground of complaint, and the Board of Review shall deal with the complaint, and either confirm, or alter, the assessment. [Emphasis added.]

130 It is therefore clear that, under both the Act and the by-laws, the bands have considerable jurisdiction to deal with assessment matters with respect to all lands within the reserve, and the appeal tribunals have jurisdiction with respect to those grounds enumerated in the by-law. One of these grounds is whether land "within the reserve" was improperly entered on the roll.

131 The respondents' complaint in this appeal, however, is not that land "within the reserve" was improperly entered on the roll, but that land not in the reserve was entered on the roll. Put differently, their complaint is that their land is not "in the reserve." As such, the complaint raises a fundamental question of whether the assessment itself was within the jurisdiction of the band, and whether appeal tribunals set up by the by-laws enacted under the Act have jurisdiction to entertain any appeal from this assessment.

132 In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. held at p. 1087 that, in determining questions of jurisdiction, the Court is to adopt a "functional and pragmatic" approach in order to answer the question: "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" In this case, the band has been given control over assessments and taxation which take place within the boundaries of the reserve. Any questions arising from assessment of land in the reserve would unquestionably fall squarely within the board's jurisdiction.

133 It is an unlikely suggestion that it is also within the board's jurisdiction to decide what is and what is not "within the reserve." In my view, it is clear that the appeal tribunals established under the various by-laws have no jurisdiction to

entertain the question of whether or not the respondents' land is in the reserve. The question of whether the land is taxable is a question of law outside the board's jurisdiction.

134 I recognize the fact that, if a complaint is brought to the appeal tribunal from an assessment notice, the tribunal may have to determine whether the land is in the reserve or not. But when the tribunal makes this determination it is deciding upon their jurisdiction, as opposed to deciding a question within their jurisdiction.

135 Deciding whether land is "within the reserve" or not will inevitably require a consideration of a variety of factors, such as real property law, survey results, and treaty interpretations, to name but a few. These are matters in which the board has no expertise and over which there is no evidence that Parliament had any intention to grant the board jurisdiction.

136 An analogy can be seen in *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230. La Forest J., for the majority of this Court, noted that before the arbitrator could consider the substantive issue of the grievance, he first had to consider whether a collective agreement was in existence. In making this determination, he was not acting within his jurisdiction. Rather, he was deciding upon his jurisdiction. The question of whether a collective agreement was still in existence required a consideration of the common law position on vested rights on which the arbitrator would have no expertise. Therefore, while he was permitted to consider whether or not a collective agreement was in force, when considering

this question he was not acting within his jurisdiction *stricto sensu*. He therefore had to be correct in his finding.

137 Similarly, in this case, the words of the by-law make it clear that the board will have jurisdiction to consider whether land "within the reserve" was improperly entered on the roll. The words of the *Indian Act* are specific that only land "within the reserve" can be subject to taxation. Just as the arbitrator in *Dayco* was deciding upon his jurisdiction when deciding whether a collective agreement was in existence, so the board in the present case would be deciding upon its jurisdiction when deciding whether or not the land was "within the reserve".

138 As such, if an application for judicial review were to be brought from such a decision, the reviewing court would be entitled to review the finding of the tribunal on this point on a standard of correctness. The Chief Justice acknowledges this point in his reasons where he says, at p. 27:

> There can be no doubt that the appeal tribunals created under s. 83(3) of the *Indian Act* have the authority to determine whether the respondents' lands are subject to the taxation by-laws of the appellant bands, although any such decisions of the tribunals will be reviewable on a standard of correctness. [Emphasis added.]

139 However, the question here is not the standard of review to be applied where a tribunal has decided a matter beyond its strict jurisdictional limits. The issue is whether a landowner who has received a notice of assessment which it claims is *ultra vires* the band to issue should be compelled to resort to the appeal procedures established by the by-laws. The problem is that the tribunals would have no more jurisdiction to decide the matter than the assessor had to issue the

notice of assessment. For this reason, it is my view that, where, as here, a fundamental issue of lack of jurisdiction is raised as the only issue, the respondent should not be compelled to proceed needlessly to the appeal tribunal who cannot determine the question but should be able to proceed directly to court to have the jurisdictional matter resolved.

140 This position is supported by *Abel Skiver Farm Corp. v. Town of Ste-Foy*, [1983] 1 S.C.R. 403, a decision of this Court with parallel facts. There, a landowner had had a parcel of land taxed by the municipality at the regular rate from 1965 to 1971. However, the landowner had leased the land to a third party, who was farming it. As a result, the land should have received favourable tax treatment under the *Cities and Towns Act* as being land under cultivation. Instead of resorting to the revision and quashing provisions available under the *Cities and Towns Act*, the landowner commenced an action in Superior Court asking that the valuation and collection rolls of the town be annulled for the relevant years, and that the tax wrongly paid be reimbursed.

141 The Court had to decide whether the taxpayer should have first made use of the appeal procedures established in the Act, or whether it was permitted to proceed directly to court. Beetz J. acknowledged that, where a municipality taxes a tax-exempt item, the municipality exceeds its jurisdiction, and the taxpayer may proceed directly to the courts. He stated at p. 424:

> On the second assumption, the municipality values for tax purposes and taxes a tax-exempt item. The courts then conclude that it has done acts which are *ultra vires* both as to valuation and taxation, and that these acts may be challenged in the ordinary superior courts of law, such as the Superior Court, in an action or a plea, in whole or in part if the subject-matter is divisible. On this assumption it does not matter

> that the taxpayer omitted to make use of the expeditious and special actions provided by law, if they were available; it also does not matter, if such actions were used, that they failed. [Emphasis added.]

Beetz J. then applies this law to the facts of the case before him, and states (at p. 435):

> The courts have consistently held, as indicated above, that when the question is whether an immovable is taxable or exempt, in whole or in part, the fact that the municipal taxing statute has provided a special appeal procedure does not oust the superintending and reforming authority of the Superior Court, and it does not matter whether the taxpayer neglected to use this procedure or, in using it, lost his case. . . .
>
> Assessors and the members of a body like the board of revision have powers that are essentially administrative. They are generally not lawyers, and they are not a superior court. It has been questioned whether it is or could be part of their functions to decide a question of law like that of the taxable nature of an immovable, a question which was within the scope of the superior courts in 1867, or to exercise, by appeal or otherwise in respect of this question, a superintending power like that exercised by the board of revision over the Town's assessors. [Emphasis added.]

Later he said (at p. 437):

> With such a complaint before them, the members of the council or the board of revision cannot avoid making a decision without compromising the integrity of their administrative functions. They must therefore respond in order to exercise the latter in accordance with the law, as much as they are able to do and as everyone must do.
>
> However, they cannot make an error in this regard, because their administrative authority depends on the correctness of the reply which they give to these questions of law. If they make an error, they remain subject to the superintending and reforming power of the Superior Court.
>
> Further, when they respond, they exercise a function which is incidental to their administrative duties, and it does not follow from the fact that they must comply with the law and have occasion to express

> that law that they must do so as would a court of law. Their response accordingly does not have the final nature of *res judicata*.
>
> This is why it is still open to the taxpayer to start over by a direct action in nullity in the Superior Court, even when he has brought a complaint to the council or board of revision and that complaint has been decided by one or the other of those bodies.
>
> It is also why the courts have not required the taxpayer to proceed before the administrative tribunals; they have concluded that in this matter of taxation and exemption a taxpayer retains the right to go directly to a judicial forum like the Superior Court, which has the power to decide the matter with the force of *res judicata*. [Emphasis added.]

142 I can see no distinction between this case and the case at bar. In both cases, the allegation was that the taxing authority exceeded their jurisdiction in some manner, and the taxpayer argued that, as a result of this excess of jurisdiction, they should be entitled to have resort directly to the courts without first going through the appeal procedures established in the legislation.

143 The appellant band argues that the earlier case of *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, should be followed instead. There the Court established the doctrine of "adequate alternative remedy". In that case, a university student was required to discontinue his studies. The applicable legislation established a right of appeal from this decision to the "committee of the council", who were obligated to "hear and decide" the matter. The committee met, heard from the university, and then decided against the student without hearing from him. Even though the Act provided for a further right of appeal to another tribunal, which was also charged with the responsibility to "hear and decide" the appeal, the student did not make use of this process. Instead, he launched an application in the Court of Queen's Bench for *certiorari* and *mandamus* against the decision of the committee of the council. The application

was granted by the Chambers Judge, but was overturned by the Saskatchewan Court of Appeal.

144 In this Court the aggrieved student argued that the breach of the principles of natural justice by the committee of the council rendered the committee's decision void *ab initio*, as a consequence of which he should not have to follow the appeal procedure to the next tribunal, but should instead be permitted to proceed directly to the courts. Beetz J., for the majority disagreed and said at p. 585:

> In the case at bar, it cannot be doubted that the committee of the council had jurisdiction to hear and decide upon appellant's application or memorial. There was no want of jurisdiction. In the exercise of this jurisdiction, the committee of the council erred in failing to observe the rules of natural justice. While it can be said in a manner of speaking that such an error is "akin" to a jurisdictional error, it does not in my view entail the same type of nullity as if there had been a lack of jurisdiction in the committee. It simply renders the decision of the committee voidable at the instance of the aggrieved party and the decision remains appealable until quashed by a superior court or set aside by the senate. [Emphasis added.]

145 Beetz J. then went on to hold that the decision of the committee, even though rendered after a violation of the principles of natural justice, could have been appealed to the senate committee, which was also given the power to "hear and decide" the matter. Therefore, this process could have adequately dealt with the matter. For this reason, Beetz J. held that this alternative remedy should have been preferred, and that the Chambers Judge should have exercised his discretion in favour of not granting *certiorari* and *mandamus*.

146 It is important to observe that, in *Harelkin* unlike the later *Abel Skiver* decision, the majority found that the committee was acting within its jurisdiction, and the decision centred around the effect that the breach of natural justice had on the student's ability to appeal the decision to the senate committee. Although Beetz J. noted that a breach of natural justice is "`akin' to a jurisdictional error", such a breach does not entail the same kind of nullity.

147 Dickson J. (as he was then), in dissent, disagreed that the student had to use the appeal procedure set out in the Act, and held that he should have been allowed to apply directly to the courts for *certiorari* and *mandamus*. He wrote at pp. 604-5:

> With respect, in my opinion, the Court of Appeal was in error in relying on any of these grounds, for these short reasons:
>
> (1) the principle of exclusion of *certiorari* in the absence of "special circumstances", where there is a right of appeal, applies only to errors within jurisdiction;
>
> (2) a decision made without natural justice is not a decision within jurisdiction;
>
> (3) when a tribunal so acts without jurisdiction, *certiorari* will be granted *ex debito justitiae*, notwithstanding a right of appeal to another administrative tribunal.
>
> The decision of the Court of Appeal rests on *Re Wilfong* [(1962), 37 W.W.R. 612 (Sask. C.A.)], to say that *certiorari* will generally be refused in the absence of special circumstances where there is a further right of appeal. But *Re Wilfong* itself expressly limited this principle to non-jurisdictional error. *Re Wilfong* speaks only to the appropriate posture on judicial review when the error alleged is not jurisdictional and when there is a full appeal to the ordinary courts. . . . [Emphasis added.]

and at pp. 608-9 that:

> [g]enerally speaking, the rule is that, if the error is jurisdictional, *certiorari* will issue *ex debito justitiae*, but if the error is error in law, then in the absence of a privative clause *certiorari* may issue. The discretion is broad when the error is non-jurisdictional and there is an appeal to the courts, but virtually disappears when the error is jurisdictional and the right of appeal, if any, is to an administrative or domestic tribunal sitting in a purely appellate role. [Emphasis in original.]

148 Therefore, I do not agree with the Chief Justice that *Harelkin* stands for the proposition that the "adequate alternative remedy" principle applies even where there is a jurisdictional error. In fact, the majority in *Harelkin* go to some length to point out that this was not a jurisdictional error. The dissent by Dickson J. is based on the supposition that it was a jurisdictional error, and that as a result the principle of adequate alternative remedies would not apply.

149 It is also noteworthy that Beetz J. wrote the majority opinions in both *Harelkin* and *Abel Skiver*, and that the former predated the latter by four years. As the author of the *Harelkin* decision, Beetz J. did not consider access to the courts in *Abel Skiver* to be barred by the presence of an appeal process. It seems clear that the distinction between the two cases is that in *Harelkin*, the error was a breach of natural justice, while in *Abel Skiver*, the assessment was *ultra vires* the municipality and therefore a question of jurisdiction.

150 *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, supports my conclusion that the adequate alternate remedies principle does not apply to a jurisdictional issue. The appellant brought an action in nullity under art. 33 of the *Code of Civil Procedure* to quash the by-laws and recover taxes wrongfully paid for certain years. It was ultimately held that a Superior Court judge has a discretion under the reforming jurisdiction of the Superior Court

pursuant to art. 33. In the course of his reasons, Gonthier J. gave the following summary of *Abel Skiver* at pp. 346-47:

> Taking into account the particular nature of the act, Beetz J. approached the question in the form of two assumptions. If the municipality used an incorrect method or an erroneous rule of valuation, a taxpayer who refrains from using or neglects to use the expeditious and special procedures provided by law will not be able to challenge the valuation roll (see *Shannon Realties, Ltd. v. Ville de St. Michel, supra*). If on the other hand it has valued a tax-exempt item for taxation purposes, its action will then be regarded as *ultra vires* and without jurisdiction and can be challenged in the ordinary superior courts of law (see *Donohue Bros. v. Corporation of the Parish of St. Etienne de La Malbaie, supra*). Having set forth these principles, Beetz J. considered the subject of the appeal. As the action asked the Court to vacate the valuation and collection rolls in respect of the appellant's land, which had been valued as an ordinary immovable, whereas it should have been recognized as "land under cultivation" within the meaning of s. 523 of the *Cities and Towns Act*, he considered that the city had valued a tax-exempt property and so committed an *ultra vires* act as it had no jurisdiction over property of this kind. [Emphasis added.]

At page 372, Gonthier J. had this to say:

> In my view, and in general terms, apart from a case where there is a total absence of jurisdiction, a judge hearing an application under art. 33 of the *Code of Civil Procedure* may refuse to grant the relief sought if, in view of the circumstances, including the importance of the alleged infringement of a right and the plaintiff's behaviour, he considers it justified to do so. [Emphasis added.]

151 In this appeal, the only complaint from the respondents is that the land in issue is not "within the reserve", and that the appeal tribunal therefore did not have jurisdiction to deal with the matter. In such a situation, I fail to see why a taxpayer in the respondents' position should be required to proceed before a tribunal which has no jurisdiction to determine their complaint. Such an alternative "remedy" cannot be considered "adequate". While I agree that, if the respondents

had chosen to proceed before the appeal tribunal, the tribunal could have considered the matter, I do not think that this should be mandatory.

152 I disagree with the Chief Justice's characterization of the case of *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49. That case does not involve any allegation of jurisdictional error. The sole issue in that case was whether the Auditor General could seek the assistance of the courts in attempting to gain access to certain documents related to the purchase of Petrofina by Petro-Canada. The Auditor General had requested these documents through the proper channels, and had been refused. The only recourse left to him in the *Auditor General Act* was to report to Parliament. The question was whether this process of reporting to Parliament constituted an "adequate alternative remedy", or whether he should, in addition, have recourse to the courts. This Court decided that reporting to Parliament was an "adequate alternative remedy", and that therefore the Auditor General could not seek production of the documents through the courts. As a result, no issue of jurisdiction arose, and it does not stand for the proposition that the adequate alternative remedies doctrine applies even in cases of jurisdictional error.

153 It is my opinion that the trial division judge erred in exercising his discretion by holding that the alternative remedy in this case was adequate when in fact the tribunal lacked jurisdiction to answer the only question raised. In such a situation, the respondents are entitled to proceed directly to the courts on an application for *certiorari*.

154 I would therefore dismiss the appeal with costs.

Appeal dismissed with costs, L'HEUREUX-DUBÉ, SOPINKA , GONTHIER *and* IACOBUCCI JJ. *dissenting.*

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