Suite 601, 1919 Saskatchewan Drive

REGINA SK S4P 4H2

FCAA

Financial and
Consumer
Affairs Authority

In the Matter of The Securities Act, 1988

and

In The Matter of

Alena Marie Pastuch

Teamworx Productions Ltd.

Idendego Inc.

101114386 Saskatchewan Ltd.

101115379 Saskatchewan Ltd.

Cryptguard Ltd.

REASONS OF THE HEARING PANEL

CONCERNING A MOTION FOR THE RECUSAL

OF GORDON D. HAMILTON, PANEL CHAIR

1. On August 3, 2013, Alena Marie Pastuch (hereafter Pastuch) submitted a request for the Hearing Panel chair (Gordon D. Hamilton) to recuse himself, the details of which are attached hereto as Appendix A. Summer vacation periods in August and an oversight by the Registrar resulted in the initial request

being forwarded to the Hearing Panel on August 27, 2013. In response to an invitation for further submissions in support of this request, Pastuch authored a subsequent document dated September 4, 2013, attached hereto as Appendix B. Consistent with other correspondence, Pastuch has attempted to impose a deadline on when the Hearing Panel must respond to her Motions.

Factual Context

2. During this time period, while the September 4, 2013 document (and other documents which will be referenced below) was being prepared and sent by Pastuch, Brian Pederson (her lay representative and the Chief Technology Officer with one of the respondent corporations) advised the Hearing Panel on September 2, 2013 that Pastuch's health had deteriorated to the point where she was "physically and medically unable to participate in any manner for the upcoming scheduled Hearing on September 10, 2103".

3. The Hearing Panel has not received the balance of Pastuch's written testimony. The initial deadline for her written testimony was July 22, 2013, when Pastuch submitted what she described as a portion of her written testimony. On August 20, 2013, her physician confirmed that Pastuch's health would permit her to attend hearings and testify for up to two hours at a time. On August 21, 2013, without any request for an extension and on its own initiative, the Hearing Panel provided Pastuch with additional time to submit her written testimony, with the extension expiring on September 4, 2013. The only written documents received from Pastuch since July 22, 2013 have been requests and motions of a procedural nature. Those documents have been numerous, lucid and well-organized, but have consistently focused on achieving further delays, adjournments or a complete halt to the proceedings.

4. In addition, Pastuch and her lay representative Brian Pederson (Pederson), have contacted the law firm of McDougall Gauley LLP, where the hearing panel chair works. The thrust of the correspondence has been to advise the law firm's executive at his place of employment "in regards to possible privacy breaches and criminal code breaches conducted by one of your lawyers Gordon Hamilton." Other correspondence to McDougall Gauley LLP was directed to [redacted], a partner with McDougall Gauley LLP, which raised a purported privacy breach, a request that the law firm investigate the allegations contained in the correspondence, and inquiring whether [redacted] will be representing the hearing panel chair and the law firm in a human rights complaint that either has been filed or is

forthcoming. Administrative staff intercepted the communication and responded to it without any involvement by [redacted].

5. Previous correspondence sent by Pastuch and/or Pederson have indicated that she has filed (or intends to file) complaints with various government agencies and regulatory bodies, that oversee privacy, human rights, government activities (i.e. provincial ombudsman), police forces, and others too numerous for the Hearing Panel to recount. All of these complaints arise out of a public hearing inquiring into allegations against her and other respondents arising out of the *Securities Act, 1988*, in which she is being forced to participate.

Scope of the Securities Commission Hearing

6. On August 27, 2010, a Notice of Hearing was issued directing Pastuch and other respondents to participate in a conference call on October 25, 2010, in order to set dates for a hearing into the allegations contained in the Notice of Hearing. The Notice of Hearing prescribes the scope of the hearing and the inquiry being conducted by the Hearing Panel. The following excerpts from the Notice of Hearing are reproduced below, to explain the scope of the hearing in order to clarify what matters may be relevant to the hearing process and the hearing panel members.

> Staff of the Commission will ask the Commission panel to consider whether it is in the public interest to make any of the following orders against Alena Marie Pastuch (Pastuch), Teamworx Productions Ltd., Idendego Inc., 101114386 Saskatchewan Ltd., 101115379 Saskatchewan Ltd. and Cyrptguard Ltd. (collectively the Respondents):
>
> (a) the exemptions under Saskatchewan securities laws pursuant to clause 134(1)(a) of *The Securities Act, 1988* (the Act) do not apply to the Respondents;
>
> (b) the Respondents cease trading in any securities or exchange contracts pursuant to clause 134(1)(d) of the Act;
>
> (c) the Respondents cease acquiring securities or exchange contracts pursuant to clause 134(1)(d.l) of the Act;
>
> (d) the Respondents cease giving advice pursuant to clause 134(1)(e) of the Act;
> (e) pursuant to clause 134(1)(h) of the Act Pastuch:
>
> (i) resign her position as a director or officer of an issuer, registrant or investment fund manager,

(ii) be prohibited from becoming or acting as a director or officer of an issuer, registrant or investment fund manager or

(iii) not be employed by an issuer, registrant or investment fund manager; and

(f) Pastuch be prohibited from becoming or acting as a registrant, an investment fund manager or a promoter pursuant to clause 134(1)(h.1) of the Act;

(g) the Respondents pay an administrative penalty of up to $100,000 pursuant to section 135.1 of the Act;

(h) the Respondents pay financial compensation of up to $100,000 to each person who or company that has suffered a financial loss caused by the Respondents' contravention of or failure to comply with Saskatchewan securities laws pursuant to section 135.6 of the Act;

(i) the Respondents pay the costs of or relating to the hearing pursuant to section 161 of the Act.

7. The Notice of Hearing further outlined alleged breaches of the *Securities Act, 1988,* as follows:
   - Contraventions of registration and prospectus requirements in sections 27 and 58;
   - Contravention of subsection 44.1(1) - unfair practice
   - Making misleading and untrue statements;
   - Contravention of section 55.1 – fraud;
   - Contravention of subsection 135.7 - withholding information.

Grounds in Support of the Motion to Recuse

8. The August 3, 2013 Motion raised only one ground as the basis for the request for recusal. That ground is the fact that [redacted] is a partner in the same law firm, working out of the Regina office, and works in the same practice area (administrative law) as the hearing panel chair.

9. Follow-up correspondence, dated September 4, 2013, in response to the Hearing Panel's request for the submission of any other information or grounds in support of the motion, listed eight (8) additional grounds (for a total of nine grounds).
   A. One of the witnesses who provided verbal testimony in the public hearing, [redacted], is a brother of [redacted].

B. There is an outstanding civil litigation matter against one of the respondent corporations (Cryptguard Ltd.), which involved another partner in the law firm where the hearing panel chair works.

C. It was alleged that an investment contract (or contracts) with investors were drafted and prepared by a lawyer with the law firm where the hearing panel chair works.

D. It was alleged that the Hearing Panel, through the panel chair, requested Pastuch's doctor to release medical files without Pastuch's consent.

E. It was alleged that the Hearing Panel, through the panel chair, did not protect and keep confidential, Pastuch's medical information contrary to several statutory obligations.

F. It was alleged that the Hearing Panel, through the panel chair, accused Pastuch of wrongdoing and have failed to investigate wrongdoing by counsel and investigators of the Financial and Consumer Affairs Authority (FCAA).

G. It was alleged that the Hearing Panel, through the panel chair, refused to permit Pastuch to call certain witnesses, so as to demonstrate bias.

H. It was alleged that the Hearing Panel, through the panel chair, refused to permit the presentation of financial documents from the TD Bank without having to fly in the Vice President from Calgary as a witness.

Analysis of the Factual Foundation of the Motion to Recuse

10. The nine (9) grounds advanced in support of the Motion to Recuse have been carefully considered, and in one instance investigated. The following analysis of the law and the facts are set out in the following paragraphs in response to the Motion.

A. McDougall Gauley LLP Partnership included [redacted] as a Partner

11. McDougall Gauley LLP is one of Saskatchewan's larger law firms, with forty-four partners and numerous associates in three cities. [redacted] works in the Regina office. The hearing panel chair works in Saskatoon. The hearing panel chair has worked at McDougall Gauley LLP since May 1,

2009. He joined the firm's partnership effective January 1, 2012. From 1999-2004, he was a Vice Chairperson on the Canada Industrial Relations Board, the country's national administrative labour law tribunal, where he authored over 200 decisions involving dual and multi-party adjudicative hearings.

12. [redacted] is not involved in any aspect of the hearing. Nor is [redacted] involved in any activities arising out of the allegations against Pastuch and the other respondents being dealt with in the Securities Commission hearing. In spite of a blatant attempt by Pastuch on September 4, 2013 to link [redacted] into these activities (by writing to [redacted] directly, by requesting that [redacted] investigate the activities of the hearing panel chair, and by making inquiries of the law firm whether [redacted] will be representing the firm and the hearing panel chair in a human rights complaint being initiated by Pastuch), there is no linkage between [redacted] and the hearing panel chair except through their business partnership arrangement in the operations of the law firm, McDougall Gauley LLP.

B. [redacted]'s Brother is [redacted], Who was a Witness in the Hearing

13. The allegation that [redacted] has a brother who was a witness in the proceedings is accurate. However, neither [redacted] nor [redacted] are parties to the proceedings. Prior to the date when [redacted] testified at the hearing, the hearing panel chair had never seen him before, did not know who he was when he testified, was unaware that [redacted] was his [redacted], and remains unaware as to whether they have a positive [redacted] relationship.

C. McDougall Gauley LLP was Alleged to be Actively Involved in Litigation Against One of the Respondents (Cryptguard Ltd.)

14. The standard and mandatory practice followed by Saskatchewan law firms is to conduct a client conflict search whenever a new file is opened. Not only the client but other affected parties are included in the search. In this instance, the hearing panel chair personally conducted an electronic conflict search once he was appointed to the hearing panel. He recently conducted a second follow-up

search when this allegation was raised by Pastuch. At one point, McDougall Gauley LLP did represent a client in a matter involving Cryptguard Ltd., but the file was closed prior to the issuing of the formal Notice of Hearing that led to the selection of members for the hearing panel. Prior to the Notice of Hearing being issued, Cryptguard Ltd. was not listed as one of the respondents. The hearing panel chair has had no involvement with the closed file, either before or since it was closed.

15. The electronic document search did not reveal the nature of the matter involving Cryptguard Ltd. and the hearing panel chair has made no inquiries. The file's paper documents are stored in Regina, while the hearing panel chair works in Saskatoon. Throughout this period of time, the hearing panel chair (like all other Saskatoon-based lawyers) has had no electronic access to the electronic version of Regina files.

D. McDougall Gauley LLP was Alleged to Have Drafted an Investment Contract

16. There have been no allegations or suggestion in this Motion that McDougall Gauley LLP had been retained to act on behalf of any of the respondents. A review of the firm's conflict and client database confirms that this is indeed accurate. Prior to the issuance of the Notice of Hearing on August 27, 2010, the firm's file in which Cryptguard Ltd. was listed as a related party had been closed. Prior to and subsequent to this Motion to Recuse, the hearing panel chair has not made any inquiries as to whether or not a review or preparation of an investment contract had been done by one of the lawyers working at McDougall Gauley LLP. The file is still closed. If the hearing panel chair was to inquire into the details of the file, specifically as to whether a partner in the firm prepared an investment contract and under what instructions, this would interfere with the normal conflict preventive screens between lawyers within law firms that ensure conflicts of interest do not arise.

17. A review of the scope of the hearing as contained in the Notice of Hearing, in which some of the allegations are outlined above, confirms that the preparation of an investment contract is immaterial and irrelevant to the allegations contained in that Notice of Hearing. Whether or not the investment

contracts contained errors or were properly prepared, the focus is not on the scope or quality of the legal services retained by an investor.

E. The Hearing Panel Chair requested Pastuch's Doctor to Provide Medical Information without Pastuch's Consent

18. On August 17, 2011, Pastuch's doctor wrote to the Hearing Panel, in support of Pastuch's request for an indefinite adjournment. He advised that there was to be no communication with Pastuch because of unspecified medical reasons, and specifically stated that no personnel from the Commission could contact Pastuch for any meetings or hearings. In accordance with the doctor's instructions not to communicate with Pastuch, the hearing panel chair, on September 12, 2011, wrote to Pastuch's doctor requesting additional information from him and reminded the doctor that he would require permission from Pastuch before he could disclose any medical information: "I would expect that Ms. Pastuch will grant you the necessary authority to disclose confidential medical information to the hearing panel..." Contrary to his medical advice to the hearing panel just one month earlier, Pastuch's doctor indicated that he would provide any medical information upon the hearing panel contacting Pastuch in order to obtain her permission to release the requested information.

F. The Hearing Panel, Through The Panel Chair, Failed To Protect And Keep Confidential, Pastuch's Medical Information

19. Pastuch had previously requested that the hearing be held in-camera (or closed hearings) and that there be a complete publication ban on the hearing. The hearing panel heard verbal submissions from her lay representative (Pederson), staff counsel who was prosecuting the respondents, and counsel for the Leader Post in relation to these requests. The requests were denied, and reasons were provided to the parties. The hearing panel advised Pastuch and her lay representative that it would be relying upon them to flag any sensitive medical issues that may arise which they believed should be kept out of the public realm. However, Pastuch and her lay representative (Pederson) absented themselves from the

bulk of the hearing. There were times when the hearing panel went *in camera* to question counsel about the relevance of the personal information that was being presented. During such *in camera* meetings, counsel was required to justify the need for certain evidence and was instructed on the scope of medical information considered relevant and/or private.

G. The Hearing Panel, Through The Panel Chair, has Accused Pastuch of Wrongdoing and Failed to Investigate the Actions of Commission Staff

20. Pastuch has filed an inordinate amount of motions, requests and submissions since the Notice of Hearing was issued in the fall of 2010. On occasions, the information or statements submitted to the hearing panel have either been inconsistent with other information and statements obtained from sources which she has relied upon (e.g. doctors and specialists reports), or have been factually wrong. In those circumstances, the hearing panel has notified her that the information or statements were wrong.

21. The flurry of motions and adjournment requests has increased in 2013, with only one possible motive – delay and avoidance of the hearing. Recently, the hearing panel requested and received a medical note from Pastuch's doctor dated August 20, 2013, which was inconsistent with what Pastuch and Pederson had been telling the hearing panel. In July, Pastuch began her testimony by telephone, an accommodation granted to her by the hearing panel because of claimed (but unsubstantiated) health issues that interfered with her ability to physically attend the hearing. After a couple of days of testimony and just before she was to continue with her oral testimony-in-chief by telephone, Pederson advised that Pastuch was unable to speak more than a few minutes at a time because of her medical issues. Thereafter, the hearing panel proposed and Pederson agreed, that Pastuch would submit the remainder of her testimony in writing. When Pastuch failed to complete the written testimony in the time allotted (which had been agreed to by Pederson after checking with Pastuch), both Pastuch and Pederson explained that she had not submitted her written testimony within the time frame originally ordered by the hearing panel because of [redacted], which now prevented her from typing. Around this same time, Pastuch was advising the hearing panel that she was well enough to [redacted]. Meanwhile, the August 20, 2013 doctor's letter advised that Pastuch was able to verbally testify to a

maximum of two (2) hours at a time, and that her medical condition had not changed since the last medical correspondence received by the hearing panel in April. The doctor's letter confirmed that she was to be undergoing tests to determine whether she was a candidate for [redacted]. Clearly, the two accounts of Pastuch's medical condition could not be reconciled and the hearing panel advised Pastuch that it suspected that her inaccurate version was an effort to mislead the hearing panel and justify further adjournments and delays. There have been other previous instances where the basis for an adjournment request has later proven to be similarly suspect and unbelievable once after-the-fact information became available to the hearing panel.

H. Refusal to Allow Pastuch to Call Witnesses on November 2012 Witness List

22. In November 2012, the formal hearing had not commenced. The Hearing Panel was involved in dealing with a preliminary motion to dismiss and a preliminary motion to recuse filed by Pastuch. The witnesses who testified in November did so solely in relation to the preliminary motions. The formal hearing commenced on December 5, 2012, after the decision on the preliminary motions was issued on December 4, 2012. The formal hearing commenced in December with witnesses testifying in support of the allegations against the respondents. The hearing panel was unable to locate any proposed list of thirty witnesses, either around November 2012 or at any other time, because there was no list with thirty witnesses. It did locate a list that was submitted well after November 2012. That list included 17 witnesses, many of whom had already testified at the hearing. At the time, the request was for the issuance of a *subpoena duces tecum* for all seventeen witnesses. There were several problems with the request. First, witnesses who had already testified against the respondents would not be subpoenaed or recalled simply because Pastuch or her lay representative chose to absent themselves from the hearing (and thereby missed their chance to cross-examine them and/or obtain undertakings to produce documents). Second, the request included a demand that certain witnesses create documents that did not exist, in order to assist Pastuch with the preparation of her own evidence. Witnesses may be compelled to attend and bring documents with them, but it is improper to require potential witnesses to create documents containing specific information. Third, Pastuch advised that she did not want many of the witnesses to testify or attend the hearing at all, but simply to produce certain documents for her to review when preparing her case.

23. Pastuch eventually came back to the hearing panel with a request for three subpoenas in June 2013, during the course of the presentation of her defence evidence. Even though she said she did not know the address of two of the three individuals, subpoenas (with their address left blank) were provided to her for two of the individuals, [redacted]. The third person, [redacted], had previously testified as a witness when Pastuch and her lay representative were absent, and this request was once again denied.

I. Financial Information from TD Bank and Denial of Opportunity to Present a Defence

24. During the preliminary proceedings, at the outset of each side's case in the formal hearing on the merits, and outside of the hearing process in frequent correspondence, Pastuch and Pederson made allegations that there was incomplete disclosure provided to her, contrary to the initial order of the Hearing Panel that full disclosure was to be provided. One of the issues involved banking records. She alleged that [redacted] had all of her bank statements, which had been subsequently turned over to the investigators. [redacted]'s testimony (and other testimony) contradicted this allegation. There were also allegations that the TD Bank, through [redacted], had provided a larger number of bank statements in the investigation process than had been disclosed to the respondents through the formal disclosure process. There appeared to be a potential issue surrounding whether proper disclosure had been provided to the respondents. The Hearing Panel had confirmed, after dismissing the preliminary motion that include issues of disclosure, that it would remain vigilant to any gaps in disclosure as the evidence unfolded.

25. Based upon the evidence presented, Pastuch had signing authority on the TD Bank accounts of the respondents, both personal and corporate. Pastuch advised the hearing panel that she has not asked for all of her bank statements from the TD Bank, because there would be a charge for them. That was one reason why she wanted the subpoena to be issued, so that she would not have to incur the expense of obtaining the bank statements herself. In June 2013, a subpoena was issued (with the address blank) for [redacted], a bank executive, to attend the hearing. His attendance might clarify two issues raised by Pastuch – the issue of disclosure and the issue of certain financial information. To date, Pastuch has not confirmed whether the subpoena has been served. Based upon her September 4, 2013 submission,

she appears unwilling to pay for his travel expenses for him to appear as a witness, and will likely not be using the subpoena provided to her.

The Law on Bias, Reasonable Apprehension of Bias, and Motions to Recuse

26. The nine grounds of allegations raised by Pastuch in relation to the hearing panel chair can be categorized in one of two groupings – bias on the basis of business or personal relationships, or bias on the basis of the manner in which the hearing, particularly procedural rulings, has been conducted. The factual clarifications have fully dealt with and answered the allegations arising in the second grouping.

27. There are numerous cases in which bias or a reasonable apprehension of bias has been considered as the foundation for a motion to recuse. One of the leading cases is *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259. At paragraph 59, the Supreme Court of Canada described the burden of proof and the presumption of impartiality:

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

28. The courts have delineated the criteria for disqualification when questions of bias or a reasonable apprehension of bias have been raised. At paragraph 60 of *Wewaykum Indian Band*, supra, the Court wrote:

> The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." [underline added]

29. This analysis is not conducted from a hypothetical or abstract perspective. The 'reasonable and right minded person' must also be fully informed of the facts. In this instance, the facts have been reviewed and set out above. Bias does not have to be actual, fact-based bias, but can include the broader scope of perceived bias or an apprehension of bias. This flows from the overarching imperative that justice must not only be done, but justice must be seen to be, perceived to be and recognized as having been done.

30. In this instance, Pastuch argues that there is actual bias in the manner in which the hearing has been conducted. Grounds E to I inclusive would fall into this category. The preceding analysis of the grounds raised in her Motion to Recuse, which reviews the facts surrounding these allegations, confirm that Pastuch is incorrect. In relation to some of the allegations contained in the grounds cited, Pastuch has knowingly promoted inaccurate facts to support her allegations.

31. Simply because a party to a proceeding does not succeed on certain rulings does not provide a basis for an allegation of bias against a hearing panel. Not every motion or request raised by Pastuch has been refused or denied. In a separate set of reasons, the hearing panel chair, on behalf of the hearing panel and in response to a request by Pastuch, ordered that the Notice of Motion be removed from the Securities Commission website.

32. However, concluding that there is no actual bias does not end the analysis. In *Wewaykum Indian Band*, supra, the Court further clarified the other elements of the bias analysis in paragraph 63:

> Saying that there was "no actual bias" can mean one of three things: that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it; that

unconscious bias can exist, even where the judge is in good faith; or that the presence or absence of actual bias is not the relevant inquiry.

33. The Court explained the reasonable apprehension of bias, including unconscious bias, in relation to the requirement for disqualification, in paragraph 67 of *Wewaykum Indian Band*, supra:

> …it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances.

34. The question to be decided in this instance has been carefully framed by the Supreme Court of Canada in *Wewaykum Indian Band*, supra, at paragraph 74 when it described the question when Mr. Justice Binnie's participation in deciding a case was being reviewed for bias:

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

35. Therefore in this instance, the question for the hearing panel to consider is: "Would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude that the hearing panel chair, whether consciously or unconsciously, can decide the issues placed before him about Pastuch fairly?"

36. There are no facts or evidence to suggest that there is any involvement of the hearing panel chair's business partner, [redacted], in this matter. [redacted] brother, [redacted], is but one of dozens of investors, and one of more than a dozen witnesses. Neither are a party. Aside from his appearance as a witness, there is no relationship (and never has been any) between the hearing panel chair and that witness. The hearing panel chair's law firm had closed its file involving one of the respondents before the Notice of Hearing was issued, and long before the formal hearing commenced. The hearing panel chair has no knowledge of the nature of his firm's legal file involving one of the respondents or of any

work done by his law firm out of its Regina office, all of which was completed years before the formal hearing commenced. The procedural rulings and interim decisions of the hearing panel, communicated by the hearing panel chair, reflect the facts as they existed at the time. In some instances, the rulings and decisions reflect the misinformation presented to the hearing panel by Pastuch, some of which was uncovered quickly and some of which is still being examined.

37. By way of comparison, it is worthwhile to quote extensively from the portion of the *Wewaykum Indian Band*, supra, decision in which the Court reviews the involvement of Mr. Justice Binnie in the file that was before the Court for its review on the issue of bias (paragraphs 83 to 85 inclusive). The Court concluded that no reasonable person would have concluded that there was a reasonable apprehension of bias in that case. To assist with the comparators, certain portions are highlighted with underlines below:

> 83 Admittedly, Binnie J.'s link to this litigation exceeded *pro forma* management of the files. On the other hand, it should be noted that he was never counsel of record, and played no active role in the dispute after the claim was filed. Memorandum No. 4, dated December 12, 1985, shows that the case was referred to the Vancouver Regional Office within a few days after filing of the Campbell River claim. Although subsequent memoranda indicate that Binnie was kept informed of some developments in relation to this claim, carriage of the action was in the hands of Mr. Bill Scarth in Vancouver. The facts do not support the proposition that Binnie planned litigation strategy for this case, as is suggested by the bands. For example, in their submissions, the Cape Mudge Band seemed to imply that the handwritten note in the margin of Memorandum No. 3 was written by Binnie in that "[he] was part of the Crown's early tactical considerations in this case; considering which approach would create the lowest risk for the Crown; which approach would constitute the 'least damaging way to go'" (see Cape Mudge's factum, at para. 12). However, upon examination of this note it would appear that it is addressed to "Ian [Binnie]" and signed "Bob [Green]". Furthermore, and as indicated above, Memos 8, 9 and 10, in particular, establish that any views attributed to Binnie earlier on were offered in the context of wider implications of the negotiation process, and not in the context of litigation.
>
> 84 Furthermore, in assessing the potential for bias arising from a judge's earlier activities as counsel, the reasonable person would have to take into account the characteristics of legal practice within the Department of Justice, as compared to private practice in a law firm. See the Canadian Judicial Council's *Ethical Principles for Judges*, *supra*, at p. 47. In this respect, it bears repeating that all parties accepted that a reasonable apprehension of bias could not rest simply on Binnie J.'s years of service in the Department of Justice. In his capacity as Associate Deputy Minister, Binnie had responsibility for thousands of files at the relevant time. While his views were sought in the negotiations stage of the present dispute, it is relevant that he was consulted on strategic orientations in dozens of cases or classes of cases. In this regard, the matter on which he was involved in this file, principally the effect of the McKenna McBride Report, was not an issue unique to this case, but was an issue of general application to existing reserves in British Columbia. This was presumably the reason why he was approached in the first place.

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

38. The linkages raised by Pastuch are substantially more tenuous and remote than those outlined in *Wewaykum Indian Band*, supra.

39. By way of further comparison, as to what an appellate court would consider as bias or a reasonable apprehension of bias, a 2013 decision of the New Brunswick Court of Appeal deals with both personal and business relationships between a judge and a party to the proceedings. It is important to note at the outset when examining this New Brunswick case, that the individual who had a relationship with the judge was one of the parties, not merely a witness among many other witnesses. In *Lambert v. Lacey-House*, 2013 NBCA 48 (CanLII), the Court initially concluded, in section IV(B), that there was no reasonable apprehension of bias. There were additional facts outlined later in the decision that led it to conclude otherwise.

> The July 6, 2012 decision of the motion judge contains the following introductory comments, which are pertinent to the issue of reasonable apprehension of bias:
>
> I was asked to hear this matter on short notice to me. The dates for the hearing had been scheduled but no judge was available. It was not until I entered the courtroom I discovered I knew the petitioner though I did not know her well.
>
> At the outset I informed Mr. Lambert I had some prior contact with Ms. Lacey-House. One of the three Lambert children was a member of the same local bagpipe band with one of my children. I would see the petitioner regularly at band practices.
>
> Perhaps more important, though somewhat more indirect, Ms. Lacey-House is now married to a by-law enforcement officer for the City of Fredericton. Prior to my appointment as a Judge I was the City Solicitor for the City of Fredericton and I worked with Mr. House. Ours was a business relationship limited to the office or a court setting. We had no social contact.
>
> My contacts with Ms. Lacey-House were limited and my connection with her husband was purely as co-workers. As a consequence, I do not consider myself to have any conflict of interest in sitting upon this case. Despite this, had I recognized the name of the Petitioner at the time I was asked to hear this case, in all probability I would have refused to proceed with this case.
>
> After I informed Mr. Lambert of the nature of my limited connections with the Petitioner, I told him I would not recuse myself and explained why. Still, I gave him the opportunity, should he

wish, to request a different judge. Mr. Lambert considered the question and determined he would prefer to proceed with the case now rather than adjourn to seek another judge. On that basis, I heard the evidence upon which I now render this decision.

[paras. 3-7]

Simply on the face of the above quoted passage, we would not be convinced a reasonable, fair minded and informed person would apprehend a lack of impartiality on the part of the motion judge…

Disposition of the Motion to Recuse

40. Having reviewed the factual foundation to the grounds of the motion to recuse and the relevant jurisprudence on bias and apprehension of bias, there is no basis for Gordon D. Hamilton as the hearing panel chair to voluntarily remove himself from the hearing panel. Accordingly, the Motion is dismissed. This is a unanimous decision of the Hearing Panel.

Dated at Saskatoon, Saskatchewan, on September 9, 2013.

Gordon D. Hamilton, Hearing Panel Chair

APPENDIX 'A'

August 3, 2013

GORD HAMILTON
Chair, FCAA Hearing Panel
Suite 601
1919 Saskatchewan Drive
Saskatchewan, Canada S4P 4H2

Dear Gord Hamilton,

As the Defendant in your FCAA hearing, I formally request you to withdraw from further participation in the deliberation of this case. I would ask that you recuse yourself from this case as per the reasons cited below. Some new information was just brought to our attention that has prompted this, in addition to the possible privacy breaches you have committed against me personally. I believe when adding this all up that it warrants a recusal.

Given the relationship you have with [redacted], a partner of your law firm in which you gain your livelihood, your decision to recuse from this FCAA investigation is most sensible course of action. [redacted] heads up the administrative law area of your firm of which is also your specialized area of practice. Further, [redacted] is a sibling of [redacted] who is a witness for the opposing side (FCAA). Furthermore, [redacted] is also in a civil litigation matter against us using your own firm and lawyers from McDougall Gauley. To my knowledge, this civil litigation matter (against CryptGuard) has never been resolved.

This state of affairs can be considered as conflicting by nature. As enunciated in Section 2.4 (1) of the Code of Professional Conduct of the Saskatchewan Law Society:

> *"A lawyer must not act or continue to act where there is conflict of interest, except as permitted under this Code."*

On this alone, your continued participation in the deliberation smacks of partisanship. Please do not forget that the integrity of these proceedings rest upon the decisions that you will make as a member of the FCAA Hearing panel. I believe that this simple correspondence could persuade you to do the right thing.

In the event that you refuse to recuse yourself, I am formally requesting a detailed letter explaining the facts and law which you have taken into account to arrive at such a decision. Moreover, I request that you cite the cases and other legal jurisprudence which you relied on in deciding not to recuse yourself. And further, I also ask that you explain why and how you do not see this above-noted situation as a potential conflict of interest.

I have copied the Chair of the FCAA, David Wild, who is ultimately responsible for this department.

Sincerely yours,

ALENA PASTUCH

APPENDIX 'B'

Wednesday September 4th, 2013

Gord Hamilton.

This is in response to your September 4th, last minute request to our August 3rd 2013 motion that you sent us today (a month later) for further information pertaining to your recusal. Below are some of the reasons we are asking you to voluntarily recuse yourself for based on conflict of interest, bias and possible criminal actions by yourself:

1) [redacted] is an FCAA witness. He is the brother of one of your law firms, McDougall Gauley, senior partner, [redacted], who is the head of Administrative Law which is the area you specialize in; and

2) Further to this, [redacted] is involved in a civil litigation matter against one of the named companies, CryptGuard, and was and is still represented by [redacted] of your law firm, in this action. To my knowledge this action has never been resolved, which is probably why the commission called [redacted] as a witness; and

3) Part of the issue being scrutinized, reviewed and decided upon in this Hearing are the legitimacy and qualifications of the investment contracts of the investors. These investment contracts are under scrutiny by both the FCAA and you as a panel member. The FCAA is saying that these investment contracts are part of the problem which has ultimately led to this Hearing. Some of these contracts, being scrutinized by both you and the FCAA, were authored and created by your law firm, McDougall Gauley. Therefore there is for sure a vested interest in absolving your law firm of any responsibility for errors with these contracts which puts you in a most definite conflict of interest.

4) You, a lawyer by trade and a "judge" in this matter, asked my doctor to not only break the law but to breach his own Rules of Conduct within his profession when you asked him to illegally and unethically release my medical files/information without my consent or knowledge.

5) I asked you specifically for my medical information to be protected and kept confidential as guaranteed to me through HIPA, PIPEDA and this province's provincial Freedom of Privacy Act. You not only outright denied me this but you allowed it to be made public and published to thousands. Your reasoning for denying it (that this is a public hearing) is an error both in law and fact as my personal medical information is INDEED still protected in public hearings. This again shows bad faith, biasness towards me and you need to be removed.

6) Throughout the years you have consistently and in writing accused me of wrongdoing such as forging medical notes, to lying about completion of treatments and now today that I misled you about my current health condition. Yet NOT ONCE have you ever been shown to be right in ANY of your defamatory accusations and false allegations you lay against me. As a matter of fact, each and every time you were proven wrong. Furthermore, when we have brought to your

attention and even irrefutably proven and shown to you (via evidence) that the FCAA staff and legal counsel have lied and intentionally misrepresented facts and evidence throughout the past 4 years, you not only outright dismiss their actions and ignore their proven wrongdoings but you refuse to investigate and correct the wrong. This, hands down, clearly demonstrates bias on your part.

7) In November 2012, I asked you for 30 defense witnesses. You ONLY granted me 2 and refused all the others based on one SOLE REASON: that you will not allow us to recall witnesses that had already been on the stand and testified as FCAA witnesses. The FCAA had 18 witnesses, so if you do the math, we would have been granted 12 of our 30 then (according to your logic). Yet you only granted us 2. Where are the other 10 witnesses? Why were they not allowed? And what is your reason for denying us for these 10 to be our defense witnesses?

8) Both sides (FCAA and us) need to present financial information from the TD bank. The FCAA was allowed to simply present these financial documents on their own and without having to incur the expense and resources of flying in the VP of Calgary (who the summons for these records goes to). Yet you refused us to simply present this evidence, same as the FCAA had, and you are making us fly in some VP from Calgary TD whom we have never met or do not know , if we want to present our financial TD evidence. We should have been afforded and granted that same privilege (to just be able to summons this VP for production of materials, same as the FCAA), all things being fair. Yet we were not as you intentionally chose to deny us this same mechanism for presenting evidence as you allowed the FCAA. This clearly demonstrates bias and prejudices my defense severely on top of this. I am not in a position to be able to afford to fly in a VP of a major Canadian bank, pay for his accommodations and days off just to present my own financial evidence. Why didn't you make Sandy from the FCAA fly this guy in as well? You had the ability to grant us the same opportunity you afforded the FCAA yet you intentionally chose not to.

These 8 reasons are the main reasons for the motion for you to recuse yourself. Unless you immediately and voluntarily recuse yourself, we, yet again, ask for a public hearing to be held on this motion prior to any commencement of the Hearing. We require your answer to be in at the **end of the business day of September 5th** as you have had this motion for over a month and you chose to leave your September 4th 2013 response to it until last minute, thus leaving us no time to properly act on this should you decide not to recuse. I will await your reply.

Alena Pastuch