LEGAL PRINCIPLES GOVERNING THE DISQUALIFICATION OF JUDGES

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While the Canadian law governing the disqualification of judges is steeped in English historical tradition, over the past decade divergent strands have been emerging in the decisions of Commonwealth courts when addressing the issue of judicial impartiality. This essay explores this Commonwealth jurisprudence as a way of facilitating our understanding of the Canadian law on the subject of when judges ought to disqualify themselves from adjudicating a particular dispute and when their failure to do so renders their decisions invalid. The author considers the general approach that the law takes to judicial disqualification and then discusses a number of typical problem areas in more detail. The essay concludes with a general discussion of the procedural questions that may arise when a party to litigation seeks to have a judge recuse himself on herself.

Bien que le droit canadien régissant la récusation des juges soit imprégnée de la tradition historique anglaise, certaines idées divergentes sont apparues au cours de la dernière décennie dans des décisions des tribunaux du Commonwealth traitant de la question de l'impartialité judiciaire. Le texte qui suit analyse cette jurisprudence dans le but de...
faciliter notre compréhension du droit canadien sur la question de savoir quand les juges doivent se récuser d'une affaire et à quels moments le défaut de le faire rend leurs décisions invalides. L'auteur examine l'approche générale du droit face à la récusation judiciaire et traite ensuite de façon détaillée d'un certain nombre de problèmes spécifiques. Il conclut son analyse par un exposé général des questions de procédures qui peuvent être soulevées lorsqu'une des parties à un litige demande à un juge de se récuser.

I. Introduction.................................................................................556
II. The General Approach to Judicial Disqualification...............558
III. Specific Problem Areas ............................................................573
IV. Personal Interests of a Financial Nature ..........................574
V. Personal Interests of a Non-Financial Nature .....................580
VI. Past Associations with Litigants or their Representatives .....583
VII. Extra-Judicial Knowledge of or Involvement with the Litigation ..........................585
VIII. Statements of Conduct that Might Indicate Pre-disposition ....586
IX. Procedural Issues Concerning Recusal of Judges ................589
X. Conclusion .............................................................................596

I. Introduction

One could easily be forgiven for thinking that nothing new could possibly be written about the legal principles governing the disqualification of judges. This is, after all, an area of the law in which the 1852 decision of the House of Lords in *Dimes v. Proprietors of Grand Junction Canal*2 is still regarded as a leading authority,3 and in which a reference to *Dr. Bonham's Case*,4 decided in 1610, does not appear entirely obscure or pedantic.5 Indeed, given the centrality of impartiality to our concept of the judicial office,6 it is difficult to imagine that this branch of the law could be anything other than steeped in history and tradition. It may seem paradoxical, therefore, that in the past decade a number of the highest courts in the Commonwealth have found

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2 (1852), 3 H.L. Cas. 759, 10 E.R. 301 (H.L).
4 (1610), 88 Co. Rep. 113b, 77 E.R. 646.
5 See the reference to *Dr. Bonham's Case* in the judgment of Mr. Justice Kirby, dissenting in part, in *Ebner*, supra note 3 at 669, para. 111.
6 For example, in *R. v. Campbell*, [1997] 3 S.C.R. 3 at para. 10, Chief Justice Lamer referred to "public confidence in the impartiality of the judiciary" as something "essential to the effectiveness of the court system."
themselves divided when addressing the law governing judicial impartiality, and that divisions have emerged as well among the Commonwealth jurisdictions in their approach to impartiality questions.8

In this essay I will review a number of the leading Canadian and Commonwealth decisions on judicial disqualification and explore the implications of the divergent strands of thinking that emerge in the jurisprudence. My goal is not to provide a comprehensive survey of the Commonwealth law on this topic, but to use the counterpoint provided by the English, Australian, New Zealand and South African decisions I discuss as a way of facilitating our understanding of the Canadian jurisprudence. Towards the end of the essay I will also make a number of observations about procedural questions that may arise when a party to litigation seeks to have a judge recuse himself or herself. In this area I will rely heavily on a very interesting article written by Mr. Geoffrey Lester of the Civil Litigation Section of the Canadian federal Department of Justice.9

The bulk of the essay, however, is directed toward the substantive rules governing judicial disqualification. The basic thrust is that the conceptual tools we use in addressing issues of judicial impartiality tend to fail us precisely in the marginal cases where reasonable people could disagree on whether or not a judge ought to be disqualified. From a practical standpoint, this is not as problematic as one might think. The central idea that judges are disqualified in situations that give rise to a “reasonable apprehension of bias”10 is surely familiar to all judges and many of the situations where a judge ought to disqualify himself or herself are obvious. No doubt many marginal cases are resolved by the expedient of the judge deciding not to sit. The phrase “When in doubt,
out!" has been criticized by some courts and judicial commentators, but it surely must represent the path of least resistance on some occasions. In addition, counsel may be justifiably reluctant to question the impartiality of a judge, especially in a marginal case. Nevertheless, the fact remains that occasions will arise when courts have to make decisions about where to draw the line in determining whether a challenge to the impartiality of a judge should or should not be upheld. My primary goal in this essay is to bring as much clarity as I can to the question of how the courts should go about this task.

In Part I of this essay I will begin by discussing the general approach that courts take to the issue of judicial impartiality. I will then explore in Part II five specific problem areas: 1) personal interests of a financial nature; 2) personal interests of a non-financial nature; 3) prior associations with litigants or others involved in the case; 4) extra-judicial knowledge of or involvement with the litigation itself; and 5) statements or conduct that might indicate a lack of impartiality. Finally, as indicated above, I will make some observations on matters of procedure in addressing judicial disqualification in Part III.

II. The General Approach to Judicial Disqualification

Although the roots of the conception of judicial impartiality

12 See Mr. Justice J.B. Thomas, Judicial Ethics in Australia, 2d. ed., (Sydney: LBC Information Services, 1997) at 55, referred to in Lester, supra note 9 at 330.
13 For an example of this practice, see E. Grant, A Pinochet Case: The Questions of Jurisdiction and Bias" in D. Woodhouse, ed., The Pinochet Case: A Legal and Constitutional Analysis (Oxford: Hart Publishing, 2000) 41 at 44. There the author discusses Lord Denning's decision to recuse himself from a case involving the Church of Scientology after an objection based on his perceived antipathy to the church. The author indicates that Lord Denning was not obliged to step down from hearing the case, but he did so nonetheless, presumably in order to avoid any possibility of concern about the impartiality of the decision the court would eventually render. For a Canadian example of a judge stepping aside where it was not strictly necessary to do so as a matter of law, see Kopyto v. Law Society of Upper Canada (1993), 107 D.L.R. (4th) 257 (Ont. Gen. Div.).
14 See R.D.S., supra note 7 at para. 113, where Cory J. observed: "Regardless of the precise words used to describe the [reasonable apprehension of bias] test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly."
employed in the Commonwealth decisions I will be discussing lie in English law, the broad analytical framework employed by the courts has evolved along two different lines. The first approach, which it is convenient to describe as the modern English approach, employs a bifurcated analysis, in which a distinction is drawn between situations where disqualification is automatic and situations in which disqualification flows from a reasoned perception that the judge may lack impartiality. The second approach, which I will describe as the Canadian approach—though it seems to have found favour in Australian, New Zealand and South African decisions as well—employs a unified “reasonable apprehension of bias” test.

The House of Lords decision in Pinochet sets out the modern English approach to judicial disqualification. Automatic disqualification flows from a situation in which the judge has a personal interest in the case that effectively makes him or her a party to the dispute. As noted above, however, disqualification may also flow from a situation of “apparent bias” (where the decision-maker’s conduct or relationships are such as to give rise to a “real likelihood” or “real possibility” that he or she is biased), a test that some would say gives greater latitude to decision-makers to resist disqualification than the Canadian “reasonable apprehension of bias” standard. Lord Browne-Wilkinson, whose reasons for decision received the support of the entire court, described the relevant principles as follows:

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause.

15 Supra note 3.

16 See R. v. Gough, supra note 8. In a very useful article entitled “Reasonableness in the Establishing of Bias”, [1979] Public Law 143, Professor Francis Alexis explores the conceptual distinction between the “real likelihood” and “reasonable apprehension” of bias standards. Professor Alexis notes that in some instances judges have expressed doubts about whether there is any real difference between the tests (see cases referred to at 150, notes 62-64). He argues, however, that the distinction lies in whether the person proposing that the decision-maker be disqualified has to demonstrate a probability that the decision-maker lacks impartiality (the “real likelihood” test) as opposed to a substantial possibility of a lack of impartiality (the “reasonable apprehension” or “reasonable suspicion” test), see at 152.
since the judge will not normally be himself benefitting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias.17

In the Pinochet case itself, Lord Hoffman had been part of a panel of the House of Lords that had heard an appeal from an extradition application involving Senator Augusto Pinochet, the former Chilean dictator. Amnesty International was granted leave to intervene in the case and took a position that was contrary to the interests of Senator Pinochet. Lord Hoffman was the chairman and a director of Amnesty International Charity Limited, the charitable arm of Amnesty International in the United Kingdom. The House of Lords, by a 3-2 majority, decided the appeal against Senator Pinochet, with Lord Hoffman joining in the conclusion of the majority. In Senator Pinochet’s subsequent application to set aside the initial House of Lords decision in the extradition appeal, Lord Hoffman’s participation in the extradition case was considered to invalidate the decision because his links with Amnesty International were such as to make him effectively the judge in his own cause. Lord Browne-Wilkinson went out of his way to emphasize that mere involvement by a judge in charitable work for an organization that had an interest in a case would not normally form the basis for his or her automatic disqualification. Thus, he stated: “Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties.”18

The Pinochet decision has been criticized by English commentators for extending the “personal interest” category from situations where the judge’s interest in the outcome of the case was financial to situations in which a broader range of personal interests was implicated. 19 There had also been some suggestions that the effect of the Pinochet decision was to call into question the continued viability of the “real likelihood” or “real danger” of bias test in situations where disqualification was not automatic.20 Subsequently, in Locabail (U.K.) Ltd. v. Bayfield Properties

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17 Pinochet, supra note 3 at 132-33.
18 Ibid. at 136.
20 Supra note 3 at 136, Lord Browne-Wilkinson noted that the Gough decision had
the English Court of Appeal gave judgment in five cases in which concerns related to bias were put forward as grounds of appeal. The court confirmed that the automatic disqualification category would not be expanded beyond the type of situation contemplated in *Pinochet* "unless such extension were plainly required to give effect to the important underlying principles upon which the rule is based." The court also reiterated its adherence to the "real likelihood" or "real danger" of bias test in cases that did not call for automatic disqualification, and took the opportunity to provide some guidance with respect to the types of situations that normally would and would not give rise to disqualification using this test. This discussion is worth setting out at some length:

It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor, or advocate engaged in a case before him; or membership in the same Inn, circuit, local Law Society or chambers. By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt upon his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or

not been followed in Canada, Australia and New Zealand but that it was unnecessary, for the determination of the *Pinochet* case, to decide whether the test needed to be reviewed. He therefore expressed no opinion on the matter.

22 Ibid. at para. 14.
23 Ibid. at paras. 16-17.
found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is a real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.\textsuperscript{24}

It is not obvious that a Canadian court would have reached a different result had a dispute based on the same facts as \textit{Pinochet} arisen in this country, but it would have employed a "reasonable apprehension of bias" line of reasoning in doing so. The utility of the English approach employed in \textit{Pinochet} is that it accurately reflects the fact that, in some types of cases (for example, situations where the decision-maker has a financial interest in the outcome) neither English nor Canadian courts engage in a serious inquiry about whether it is reasonable to believe that the interest is likely to affect the decision maker's impartiality. In other words, in some types of situations, disqualification is practically automatic, and the English approach leaves no doubt about it.

Even in cases where doubt has been cast upon the automatic disqualification approach, such as the majority decision of the High Court of Australia in \textit{Ebner v. The Official Trustee in Bankruptcy},\textsuperscript{25} the concern has not been with the principle that disqualification for some types of financial interest is essentially automatic but with the idea that that the amount of the interest in question is of little or no consequence in determining when a judge should be disqualified. Thus, the majority judgment in \textit{Ebner} states:

\ldots W\text{e} accept that, in the practical application of the general test to be applied in cases of apprehended bias, economic conflicts of interest are likely to be of particular significance, and that, allowing for the imprecision of the concept, the circumstance that a judge has a not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation will ordinarily result in disqualification.\textsuperscript{26}

The difficulty with the English approach is that, once it starts being applied beyond the range of situations in which the decision-maker has a personal financial interest (as it was in \textit{Pinochet}), the line starts to blur between cases where a decision-maker has a relevant interest in the subject matter of the dispute and those where a party might harbour suspicions that the judge has sympathies that might influence his or her

\footnotesize{\textsuperscript{24} Ibid. at para. 25 (case citations omitted). For another concise list of situations that are not thought to form a basis for judicial disqualification, see G. Lester, \textit{supra} note 9, at 333-35.}

\footnotesize{\textsuperscript{25} Supra note 3.}

\footnotesize{\textsuperscript{26} Ibid. at para. 58.}
ability to be impartial. The Court of Appeal's decision in *Locabail* seems to suggest that further extensions of the automatic disqualification approach will be rare (perhaps vanishingly rare) and that, in England, most non-financial situations will be assessed using the "real danger of bias" test in a manner that may not be fundamentally different than the approach a Canadian court would take using the "reasonable apprehension of bias" test.

Outside of Quebec, the law governing judicial disqualification in Canada is basically common law rather than statute law. Moreover, the grounds for judicial disqualification enumerated in the Quebec Code of Civil Procedure are not intended to be exhaustive, with the result that the more general common law guarantees of judicial impartiality apply with equal force in that province. Although judicial impartiality is a constitutional as well as a common law imperative, Canadian courts have used the same basic approach to impartiality in the constitutional setting as they employ at common law. Indeed, this approach transcends the judicial arena and underlies our thinking about impartial adjudication in the administrative tribunal setting as well.

In her concurring judgment in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, Madame Justice L'Heureux-Dubé shed some light on the approach Canadian courts take to impartial

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27 Chapter V of the Quebec Code of Civil Procedure, R.S.Q. c. C-25, (sections 234-242) sets out rules governing the recusation of judges in civil proceedings in Quebec (sections 234-35) as well as a procedural framework for making decisions concerning the recusation of judges in such proceedings (sections 236-42).


29 For example, section 11(d) of the Canadian Charter of Rights and Freedoms states: "Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." The Supreme Court of Canada has interpreted judicial impartiality for purposes of section 11(d) using the same test for impartiality that is employed at common law. See R.D.S., supra note 6, at para. 31 (per L'Heureux-Dubé and McLachlin, J.). See also Valente v. The Queen, [1985] 2 S.C.R. 673; R. v. Lippé, [1991] 2 S.C.R. 114 and Raffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267. This is equally true of the interpretation of the analogous right enshrined in section 23 of the Quebec Charter of Human Rights and Freedoms, R.S.Q. c. C-12, which states: "Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or the merits of any charge brought against him." See *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 (hereafter *Régie*).

30 Thus, the leading Supreme Court of Canada decision on the test for impartiality is an administrative law case: *Committee for Liberty and Justice v. National Energy Board*, supra note 10. See also comments by the South African Constitutional Court on the relationship between impartiality in the judicial and administrative law arenas in *S.A.R.F.U.*, supra note 11 at para. 35.

31 *Régie*, supra note 29 at paras. 73-264.
adjudication. Although her remarks were addressed to impartiality in the context of administrative tribunals, they are equally instructive, in my view, when applied to the impartiality of judges. L'Heureux-Dubé J. began her discussion by observing that, "The concept of impartiality should be seen as a dichotomy involving two states: that of bias and that of impartiality. The only choice in such a dichotomy is between bias and impartiality, meaning that there is no intermediate option and thus no continuum." The significance of this observation for judges is that the obligation to be impartial is not something that is subject to flexibility or compromise. L'Heureux-Dubé J. then went on to explain how we determine, in law, whether the requirement of impartiality is met:

Since impartiality is not a continuum, an administrative agency will either comply with the duty by being impartial or breach the duty by being biased; there is no intermediate situation. The fundamental question that must be answered in each case is the following: was or is the administrative agency biased? Since it is impossible to have direct access to the psychological foundations of bias in a decision maker's mind, it is necessary to rely on an indicator that allows the question to be answered judicially. That indicator is reasonable apprehension of bias, which I have already discussed. The legal issue thus becomes the following: would the administrative agency cause an informed person to have a reasonable apprehension of bias in a substantial number of cases? If so, a legal finding of bias will result; if not, a legal finding of impartiality will be made.33

The discussion of "reasonable apprehension of bias" to which L'Heureux-Dubé J. referred is found in the following passage from her reasons:

In my view, the distinction between bias and reasonable apprehension of bias must be clarified at this point. While bias is an indivisible concept, reasonable apprehension of bias must be seen as varying with the tribunal in question and all the relevant circumstances.

... [I]t is true that in the context of a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm, whereas greater flexibility must be shown toward administrative tribunals. However, such flexibility must not be shown in respect of impartiality: the requirement of impartiality cannot be relaxed. Flexibility must rather come into play in the specific content of the test for reasonable apprehension of bias in each individual case.

Thus, it is the reasonableness of the apprehension that will vary among administrative tribunals, not their intrinsic impartiality. In other words, a given reason for apprehending bias may be reasonable in a criminal trial but unreasonable in a quasi-judicial hearing. In every case, however, the decision-making body must be perfectly

32 Ibid. at para. 110.
33 Ibid. at para. 129.
impartial; if it is biased, it will immediately violate the nemo judex in propria sua causa
debet esse rule.\textsuperscript{34}

Madame Justice L'Heureux-Dubé's reasons identify a central difficulty
that we experience in dealing with the concept of impartiality, which is
that we have no appropriate vehicle for identifying whether a particular
judge was, in point of fact, impartial. One way of addressing this dilemma
is to rely on the integrity of our judges, and the significance of this
reliance is often neglected.\textsuperscript{35} Nevertheless, this is unlikely to prove
completely satisfactory, and as a result we must normally have recourse
to a different test, which is whether or not the circumstances of the case
give rise to a "reasonable apprehension of bias". It is less obvious,
however, why the obligation on the part of decision-makers to be
impartial is absolute but the test for whether or not a "reasonable
apprehension of bias" is present is flexible or variable.

In order to understand this, it is useful to begin by exploring the
difficulties our legal system has in identifying what it means for a
decision-maker to be impartial. At first glance, one might have the
impression that the idea of impartiality needs little elaboration. Judith
McCormack describes the legal requirement of impartiality on the part of
a decision-maker as part of "an even more basic and broader assumption
about adjudication", whether it is conducted by courts or by
administrative decision-makers. This is "the idea that adjudicators will
base their decisions on the evidence and the law before them, and not
upon extraneous considerations, including fear, self-interest or
prejudice."\textsuperscript{36}

It is relatively easy to identify settings in which this requirement is
not met, the most obvious being a situation in which the decision-maker
has taken a bribe. Unfortunately, the range of situations in which
impartiality can be called into question is much broader than the simple
cases where decision-makers deliberately abuse their authority for their
own financial gain. The Supreme Court of Canada's decision in the \textit{R}
\textit{D.S.} case \textsuperscript{37} nicely illustrates this complexity. \textit{R.D.S.} was a criminal case
in which a Nova Scotia Youth Court judge acquitted a young black man
on charges of assaulting a white police officer and resisting the officer in
the execution of his duties. The alleged offences occurred while the
officer was arresting another black youth and the accused intervened.
Only the officer and the accused testified at the trial. The judge decided

\textsuperscript{34} \textit{Ibid.} at paras. 112, 114 - 115.

\textsuperscript{35} See R. Devlin, ""We Can't Go On Together with Suspicious Minds: Judicial Bias
the author comments on the significance of the presumption of regularity in bias cases and
the onus of proof on the person alleging bias.


\textsuperscript{37} \textit{Supra} note 7.
that the charges were not made out because she preferred the account of
the incident offered by the accused to that offered by the officer on certain
points. In and of itself, the judge's conclusion is unremarkable, but some
of the observations the judge made during the course of her reasons gave
the impression that she believed that the officer's actions were racially
motivated. The trial judge did not point to anything in the evidence that
suggested that the officer's conduct was racially motivated. She relied
instead on her general understanding of the troubled history of race
relations with the police in Halifax in concluding that it was likely that
the officer over-reacted to the intervention of the accused in the arrest of
the other youth. The following observations gave rise to the controversy:

The Crown says, well, why would the officer say that events occurred the way in
which he has relayed them to the Court this morning. I am not saying that the Constable has
misled the court, although police officers have been known to do that in the past. I am
not saying that the officer overreacted, but certainly police officers do overreact,
particularly when they are dealing with non-white groups. That to me indicates a state
of mind right there that is questionable. I believe that probably the situation in this
particular case is the case of a young police officer who overreacted. I do accept the
evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems
to be in keeping with the prevalent attitude of the day.38

The Crown appealed to the Nova Scotia Supreme Court, taking the
position that there was no evidence to support this conclusion and that the
judge's findings gave rise to a reasonable apprehension of bias. The Nova
Scotia Supreme Court agreed with the Crown's submission on the
reasonable apprehension of bias point, overturned the acquittal, and
ordered a new trial.39 The Nova Scotia Court of Appeal, by a 2-1 majority,
dismissed an appeal from this decision. By a 6-3 majority, the Supreme
Court of Canada reversed and restored the original decision acquitting the
accused.40

One thing that is immediately noticeable about this case is the
remarkable level of judicial disagreement about the issue of whether the
trial judge's reasons had betrayed a lack of impartiality on her part. This
is not because of any fundamental disagreement about the relevant legal
test. All the judges who ruled on the issue agreed that the relevant legal
test was the "reasonable apprehension of bias" test identified by Mr.
Justice de Grandpré in his dissenting reasons for judgment in Committee
for Justice and Liberty v. National Energy Board:

[T]he apprehension of bias must be a reasonable one held by reasonable and right-
minded persons, applying themselves to the question and obtaining thereon the

38 Quoted by Cory J. in R.D.S., supra note 7 at para. 74.
required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude...".

On the surface, the basis for the disagreement among the members of the Supreme Court of Canada lay in the application of that test to the facts of the case. L’Heureux-Dubé and McLachlin JJ., (with whom La Forest and Gonthier JJ. concurred), found that the observations the trial judge made not only failed to give rise to a reasonable apprehension of bias, they were entirely appropriate in the circumstances. Their reasoning begins from the premise that complete neutrality or objectivity is impossible because judges are human beings whose understanding of the world, and the law and evidence before them, is inevitably shaped by their own experiences and perspective. In light of this, what can reasonably be demanded is not objectivity, but impartiality. Justices L’Heureux-Dubé and McLachlin define impartiality by referring to the following observation from the Canadian Judicial Council’s *Commentaries on Judicial Conduct*:

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

The challenge for Justices L’Heureux-Dubé and McLachlin was to identify what it is that allows us to be confident that a judge is actually open-minded when he or she reaches conclusions that are consistent with his or her "sympathies or opinions". This can be seen to be particularly troublesome when others using a different perspective could plausibly justify a different conclusion than that reached by the decision-maker, since it appears that the decision-maker’s "sympathies or opinions" rather than the law or the facts dictate the outcome of the case. L’Heureux-Dubé and McLachlin JJ. sought to resolve this difficulty by relying on the requirement that an apprehension of bias be "reasonable", and by commenting in the following terms on the factors that distinguish reasonable from unreasonable apprehensions concerning the impartiality of judges:

> We conclude that the reasonable person contemplated by de Grandpré J., and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of

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41 Supra note 10 at 394. It is worth noting in passing that the test that is commonly cited is the one offered by de Grandpré J. in dissent rather than the test set out by Laskin C.J. writing for the majority. The operating assumption is that there is no meaningful difference between the two tests and that the language used by de Grandpré J. is slightly more elegant. This suggests that the element of judgment in the application of the test is more significant than the exact wording of the test itself.

the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.

Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality. 43

Cory J. (with whom Iacobucci J. concurred) agreed that the trial judge's statements did not give rise to a reasonable apprehension of bias, but his reasons for doing so were quite different than those of Justices L'Heureux-Dubé and McLachlin. Mr. Justice Major (with whom Lamer C.J. and Sopinka J. concurred) dissented, but he expressed a preference for the approach to bias articulated by Cory J. over that put forward by L'Heureux-Dubé and McLachlin JJ. As a result, Mr. Justice Cory's approach should probably be considered to represent the majority view.

Like L'Heureux-Dubé and McLachlin JJ., Mr. Justice Cory emphasized the idea that the hallmark of impartiality is the willingness of the judge to approach the case to be adjudicated with an open mind. He offered a number of definitions of impartiality, the most useful of which is the following statement by Watt J. in R. v. Bertram:

In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case. 44

In addition, Mr. Justice Cory agreed with L'Heureux-Dubé and McLachlin JJ. in recognizing that "not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable C in other words, it is not "wrongful or inappropriate"." 45

43 Ibid. at paras. 48-49.
Where Mr. Justice Cory’s reasons depart from those of L’Heureux-Dubé and McLachlin JJ. is in his approach to the revelation and use that is made of these pre-dispositions. To begin with, Cory J. distinguished between the use of a judge’s understanding of the “social context” of a case as a basis for judicial development of the law, and the use of social context as an aid to making findings of credibility. In the latter situation, decision-makers must be particularly careful not to draw conclusions based on generalizations. Cory J. put it this way:

... [I]t is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.

When making findings of credibility it is obviously preferable for a judge to avoid making any comment that might suggest that the determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. It is true that judges do not have to remain passive, or to divest themselves of all their experience which assists them in their judicial fact finding... Yet judges have wide authority and their public utterances are closely scrutinized. Neither the parties nor the informed and reasonable observer should be led to believe by the comments of the judge that decisions are indeed being made based on generalizations.46

Mr. Justice Cory was of the view that the comments of the trial judge in the R.D.S. case were “unfortunate”47 and “very close to the line”,48 but that when they were taken in the context of all that was said at the trial, they did not give rise to a reasonable apprehension of bias.

Mr. Justice Major dissented because he did not believe that the surrounding circumstances could overcome the perception, caused by the trial judge’s remarks: that her assessment of the evidence was based, at least in part, on a stereotype that police witnesses are likely to lie in testimony concerning their dealings with non-whites. He concluded by observing:

It is irrelevant conjecture as to what the trial judge actually intended by these statements [the passage from the trial judge’s oral reasons quoted above]. I agree with my colleague Cory J., that there are other plausible explanations of these impugned

47 Ibid. at para. 147.
48 Ibid. at para. 152.
comments. It may be that all of her remarks were merely intended as a hypothetical response to the Crown’s suggestion that the police officer had no reason to lie, and therefore innocuous. However, we are concerned with both the fairness and the appearance of fairness of the trial, and the absence of evidence to support the judgment is an irreparable defect.49

I have described the reasoning of the different members of the Court in *R.D.S.* in some detail because these reasons reveal both our underlying dilemma in dealing with the issue of impartiality, and the two broad insights that inform our legal system’s attempts to address it. The basic dilemma is that realistic observers understand that, at least in marginal cases, the exercise of judgment is influenced by the “sympathies and opinions” of the decision-maker, and that at times the pre-dispositions of the decision-maker will have a determinative effect on the outcome of a case. Yet if we acknowledge that this is the case, it appears to threaten not only our tradition of impartial decision-making but our belief in the rule of law. The insight that L’Heureux-Dubé and McLachlin JJ. draw upon to resolve this dilemma is that not all pre-dispositions are improper, and that it is important to develop a principled basis for distinguishing those “sympathies and opinions” that can legitimately be employed to underpin a judge’s reasoning from those that cannot. The thinking of Cory and Major JJ. is informed by the insight that if we are to reconcile those who are not content with the result reached by a decision-maker with the justice of the system that led to the result, we must do everything we can to avoid overt reliance on judicial “sympathies and opinions” that might be regarded as controversial.

It is important not to exaggerate the divergence between these two lines of thinking. Mr. Justice Cory does, after all, accept the proposition that the expression of at least some “sympathies and opinions” that influence a judge’s decision-making are objectively justifiable. He is more cautious than L’Heureux-Dubé and McLachlin JJ., however, about linking his conclusions concerning the justifiability of the sympathies and opinions expressed by the judge and his conclusions concerning the public perception of judicial impartiality. For Mr. Justice Cory, in other words, the impartiality inquiry is not only about whether the sympathies and opinions expressed by the judge were sound, but also about whether it was judicious for the judge to express his or her reliance on them.

The difficulty with linking the reasonableness of an apprehension of bias with the reasonableness of the “sympathies and opinions” expressed by the judge is that the courts leave themselves open to the charge that what they are endorsing is not impartiality but a certain form of orthodoxy. Ascribing certain views to the “reasonable observer” also has the unfortunate rhetorical effect of seeming to suggest that those who do not share these views, or who share them only in a qualified manner, are

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49 Ibid. at para. 22.
being unreasonable.\footnote{For example, as noted above, L'Heureux-Dubé and McLachlin J.J. state at para. 48 of their judgment in the R.D.S. case that "The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality" (supra note 6). It seems to me that this approach to discussing impartiality, and the analysis that follows, tends to reinforce the sensibilities of those who were already sympathetic to the trial judge's assessment of the facts in the R.D.S. case. Unfortunately, and I say this with respect, it does little to reconcile those who were unhappy with this assessment to the justice of the trial judge's decision. It seems to me that the same criticism could also justifiably be leveled at the Court's reasoning on the bias issue in Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.}

In my own view, the strand of thinking that is represented by the reasons of Cory and Major J.J. in R.D.S. represents the prevailing view in Canadian law precisely because it recognizes the dangers posed by the other approach and seeks to avoid them. The difference between the results reached by Cory and Major J.J. in R.D.S. reveals, however, the limitations of this approach. When we focus our attention on making sure that a judge's outward behaviour does not provoke controversy, we can unintentionally send the signal that we are more interested in the appearance of bias than we are in the achievement of true impartiality. More fundamentally, however, we are left with too weak a sense of what true impartiality entails to help us in difficult cases where an argument is
advanced that a reasonable person would question the decision maker’s impartiality. We can identify categories of situations that have been deemed acceptable and others that have not, but it is difficult to determine what precisely it is that makes the difference in close cases. Indeed, the fact that judges sometimes reach different results while purporting to use the same legal test is a good indicator of the ongoing difficulty we experience with this approach to bias.

The existence of multiple strands of judicial thinking about impartiality and the open-textured character of the prevailing strand helps to explain why the “reasonable apprehension of bias” test is described as flexible or variable, whereas the underlying concept of impartiality is rigid. As a matter of law it makes little sense for us to speak of acceptable “degrees” of impartiality; the decision-maker will be deemed as a matter of law either to be impartial or not, but an intermediate state holds little attraction. On the other hand, our uncertainty about the hallmarks of impartiality allows us to say that some factors that would be deemed to demonstrate a lack of impartiality in one setting will be considered to be acceptable in another. Likewise, it helps to explain why some types of situations (for example, those where the judge has a direct financial interest in the outcome of the dispute) can form the basis for disqualification even when it would be unreasonable to believe that the interest would interfere with the judge’s ability to adjudicate impartially.52

The careful reader will already have noticed that even though the focus of the previous discussion was the meaning of impartiality, the discussion very quickly passed to consideration of the “reasonable apprehension” of bias. There are several reasons, both principled and practical, for this approach to the question of whether or not a decision-maker is impartial. From the standpoint of principle, it is important to us that our systems of adjudication (whether administrative or judicial) have public credibility. The efficacy of our system of law is built very heavily on voluntary compliance with the decisions of courts and tribunals. There will be times, of course, when compulsion is needed to secure compliance. Nevertheless, even a cursory examination of the difficulties our legal system experiences when we need to take enforcement action in areas of public controversy, such as environmental protests or protests relating to abortions, ought to be sufficient to highlight the value of voluntary compliance. Because we believe that the likelihood of voluntary compliance is enhanced by the perception that our legal system is a fair one, it is important to us that the parties to proceedings, and the public more generally, perceive that our decision-makers are impartial.

From a practical perspective as well, there are attractions to concentrating on a reasonable perception of bias rather than demanding

52 See Dimes v. Proprietors of Grand Junction Canal, supra note 2.
Proof of actual bias. While it is commonplace in our criminal justice system to infer an individual’s intentions from his or her conduct, it is often difficult to draw conclusions about a decision maker’s subjective willingness to be open-minded on the basis of his or her actions or words. For someone wishing to challenge the impartiality of a decision maker, attempting to demonstrate that the decision maker is actually biased — even on an evidentiary standard of the balance of probabilities — raises extraordinary problems of proof. Moreover, the situation is not much better for a decision maker who wishes to show that he or she was not biased, due to the notorious difficulties of proving a negative assertion. Finally, the process of attacking and attempting to shore up the reputation of the decision maker in proceedings where the actual impartiality of the decision maker is under attack is likely to damage the public perception of the system being challenged, even if the challenge itself ultimately fails. The “reasonable apprehension of bias” standard thus has a practical appeal both to those who want to challenge the impartiality of decision makers and to those who wish to resist such challenges.

It is, I would argue, this shifting focus of the “reasonable apprehension of bias” test that makes it troubling for some observers, and makes it difficult to apply in close cases. In some situations we are assiduous in our respect for the perceptions of litigants about the appearance of impropriety, to the point that we are prepared to disqualify judges with little or no regard to the likelihood that their impartiality is truly impaired. In other situations, we ask litigants to take it on faith that judges can set aside their own preconceptions and beliefs and decide matters based on an impartial assessment of the evidence and the law put before them. It is not obvious to me that Canadian law governing bias needs to be fundamentally reconceived. I hope, however, that I can be forgiven for reflecting a personal preference for those strands of the jurisprudence that are more modest in their rhetorical and policy ambitions and more pragmatic in their assessment of the types of concerns to which we ought to have regard in deciding when it is and is not appropriate to call a judge’s impartiality into question.

III. Specific Problem Areas

As I indicated above, Canadian thinking about the “reasonable apprehension of bias” test tends to identify different situations or conduct that will be deemed to be suspect, regardless of whether or not the particular decision maker whose impartiality is under scrutiny is subjectively able to maintain his or her impartiality. This is not to say that a judge’s subjective assessment of his or her own ability to decide impartially is irrelevant, but merely to suggest that this is a necessary but not sufficient consideration in determining the existence of impartiality in law. Broadly speaking, there are five types of situations in which the impartiality of judges and administrative decision-makers can be
challenged successfully under Canadian law. The first is when the judge has a personal financial interest in the outcome of the matter being decided. The second is when the judge’s impartiality can be said to be impaired because of his or her current personal relationships with one or more of the parties whose case is being decided or some other person who has a significant role in the case. It is useful, in my view, to draw a distinction between the second class of cases and a third group, in which the concern is based on the association of the judge in the past with one or more of the parties or with a person who has a significant role in the case. The fourth type of situation is when the judge has acquired knowledge of, or been involved in, the litigation in some capacity other than his or her current capacity as judge. Finally, the fifth situation is when the words or behaviour of the judge or administrative decision maker form the basis of a challenge to his or her impartiality, which is the type of situation confronted by the Supreme Court of Canada in the R.D.S. case discussed above. I will discuss each of these types of cases below.

IV. Personal Interests of a Financial Nature

In some respects, situations where the judge has a financial interest in the outcome of a decision that he or she may make are the easiest ones in which to predict the outcome of the reasonable apprehension of bias test. With very few exceptions, which will be discussed below, a direct financial interest in the outcome of the dispute will automatically give rise to a reasonable apprehension of bias and cause the decision maker to be disqualified. The key point here is that Canadian courts, like their English counterparts, have been extremely reluctant to engage in an assessment of whether the financial interest in question is sufficiently significant that a reasonable person would conclude that the existence of the interest would influence the decisions maker. Indeed, in the classic English case on the subject, *Dimes v. Proprietors of the Grand Junction Canal*, the court emphasized that nobody could conclude that the judge could be influenced by the insignificant interest he had as a shareholder in the company that was involved in litigation before him. This did not stop the court from deciding that a challenge to the validity of the judge’s decision on the ground of bias must be sustained.54

The main reason, in my view, for this relatively rigid approach to bias in cases where there is a financial conflict of interest is that courts tend to assume that we can afford to indulge the sensibilities of parties in these

53 For a somewhat different typology, see R. Kligman, *Bias* (Markham, Ontario: Butterworths, 1998) especially at 102-21, where the author discusses in tabular form a number of cases involving allegations of bias made against Canadian judges and judicial officials.

54 *Supra* note 2. Lord Campbell observed (at 315): “No one can suppose that Lord
situations because such conflicts are relatively easy to avoid. It can be argued that little is lost by taking a rigid approach to financial conflicts of interest, and the integrity of the decision-making process is enhanced by refusing to consider whether the financial interest is sufficiently significant that a reasonable person would be concerned about its effect on the decision maker’s impartiality. Indeed, from the point of view of both the decision maker and the litigants, there may be significant practical advantages to using a “bright line” test for disqualification in this area.55

Whether or not the older English cases would be applied literally in Canada today is a matter of some contention. In his partial dissenting judgment in Ebner, Mr. Justice Kirby indicated, relying on Ghiardosi v. Minister of Highways for British Columbia,56 that “in Canada, the continuing authority of Dimes appears to have been accepted by the Supreme Court.”57 It is true that in the Ghiardosi case the Court cited with approval the famous passage from Lord Campbell’s judgment in Dimes referred to above. When that reference is taken in context, however, it is clear that the Court in Ghiardosi was using the Dimes decision to refute counsel’s argument that there was no reason to believe that the arbitrator whose decision was being challenged in the case had been anything other than impartial. The Court’s point, in other words, was that it was unnecessary to find that the arbitrator was actually biased in order to quash his decision; it was sufficient if there was a reasonable apprehension of bias.

Writing in 1991, the authors of the Canadian Judicial Council’s Commentaries on Judicial Conduct were rather circumspect about the question of whether or not an insignificant financial interest in the outcome of litigation is a sufficient basis for disqualifying a judge. After discussing the relevant Canadian jurisprudence, the Commentaries stated:

The only certain statement of a Canadian rule is that a significant, direct pecuniary interest in the litigation will disqualify. Remoteness of interest may be an issue but it is unclear to what extent, if any, the rule applies to an insignificant interest. Even a Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern...” but this did not prevent this interest from causing his disqualification. Similarly, in R v. Hammond (1863), 9 L.T. (N.S.) 423 at 423, Blackburn, J. stated, in deciding that a judge with any direct pecuniary interest in a case is disqualified from presiding: “The interest to each shareholder may be less than a farthing, but still it is an interest.” 55

55 For a very useful discussion of the policy reasons favouring a relatively rigid approach to judicial disqualification based on a judge’s direct financial interest in the outcome of the dispute, see the judgment of Mr. Justice Kirby, dissenting in part, in Ebner, supra note 3 at paras. 141-63.
57 Ebner, supra note 3 at para. 152.
remote, or insignificant pecuniary interest, which does not disqualify per se may, in 
some circumstances, give rise to a reasonable apprehension of bias.\footnote{58}

On the other hand, the Canadian Judicial Council’s 1998 publication, \textit{Ethical Principles for Judges}, indicates that a “broadly formulated” rule 
of disqualification in respect of financial interests “cannot be strictly 
apply... Owing an insurance policy, having a bank account, using a 
credit card or owning shares in a corporation through a mutual fund 
would not, in normal circumstances give rise to conflict or the appearance 
of conflict unless the outcome of the proceedings before the judge could 
substantially affect such holdings.”\footnote{59}

It is worth exploring in more detail three areas that help to explain the 
evolution in our thinking about financial conflicts of interest reflected by 
the differences between the \textit{Commentaries} and the \textit{Ethical Principles} 
noted above. The first point is that, as the \textit{Commentaries} suggest, there is 
general agreement that some kinds of financial interests are too remote or 
speculative to form the basis for disqualification. In \textit{Re Energy Probe and Atomic Energy Control Board},\footnote{60} for example, the Federal Court of 
Appeal rejected an argument that a member of the Atomic Energy Control 
Board should be disqualified from hearing Ontario Hydro’s application 
for renewal of its operating licence for a nuclear power plant because he 
was the president of a company that supplied cables to companies 
running nuclear power plants, including Ontario Hydro. The majority 
(Heald and Stone JJ.A.) came to this conclusion because the Board 
member had no direct financial interest in the outcome of the renewal 
application. Marceau J.A. rejected a categorical distinction between 
direct and indirect financial interests and would have found that the Board 
member should have been disqualified if there was a reasonable 
expectation that his company would benefit financially from the outcome 
of the decision. He reached the same conclusion as the majority on the 
facts of the case, however, because he found that the prospect of financial 
gain was too contingent and remote to constitute the type of interest that 
gave rise to pecuniary bias.\footnote{61}

Secondly, a consensus has been emerging in the Commonwealth 
courts that have addressed the issue that there ought to be a \textit{de minimis} 
exception to disqualification for financial interests, even if the general 
rule remains one of automatic disqualification. The New Zealand Court 
of Appeal took this position in the \textit{Auckland Casino} case,\footnote{62} as did the

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\footnote{58} Canadian Judicial Council, \textit{supra} note 42 at 62. 
\footnote{59} Canadian Judicial Council, \textit{Ethical Principles for Judges} (Ottawa: Canadian 
Judicial Council, 1998) at 42. 
\footnote{61} See also \textit{R. v. Bristol Betting and Gaming Licensing Committee, ex p. Callaghan}, 
one of the companion cases to \textit{Locabail, supra} note 21, at paras. 105-09. There the judge 
was a director of a family company that had as one of its commercial tenants the
English Court of Appeal in *Locabail*.

The courts of South Africa have adopted this view as well.

Even Mr. Justice Kirby of the Australian High Court, who dissented from the majority decision in *Ebner* rejecting the continued use in that country of an automatic disqualification rule concerning all cases where a judge could be said to have a financial interest in the dispute, stated that he would be prepared to accept the use of a *de minimis* exception.

Assuming that such an exception was accepted in Canada, the interesting question would be, what type of situations would it embrace? The English Court of Appeal in *Locabail* stated that the exception should be limited to situations in which "the potential effect of any decision on the judge's personal interest is so small as to be incapable of affecting his decision one way or the other; but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification." The New Zealand Court of Appeal in *Auckland Casino* was of the view that a combined shareholding between the decision maker in question and his wife of some 18,000 shares worth more than a dollar each could not be dismissed as insignificant, even though it represented less than 3 per cent of their total investment portfolio.

Finally, Mr. Justice Kirby in *Ebner* stated that he "would confine the exception to cases where the pecuniary interest in question is so trivial and insubstantial that the suggestion of disqualification could be dismissed as absurd. Cases attracting this exception would be few." I assume that the relatively tight restrictions all of these decisions place on the *de minimis* exception are designed to ensure that that the exception does not expand to the extent that it threatens the "bright line" character of the automatic disqualification rule.

This brings me to the third point, which is that when allegations of financial interest arise because of a judge's involvement with a company that is a party to litigation, it is important to determine whether the relevant consideration is the extent of the judge's financial interest in the company or the extent to which the litigation was likely to affect the value of the judge's investment. This issue seems to me to lie at the heart of the

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62 *Supra* note 8 at 148.
63 *Supra* note 21 at para. 10.
65 *Ebner*, *supra* note 3 at 686, para. 167.
66 *Supra* note 21 at para. 10.
67 *Supra* note 8 at 146-47 and 148-49.
divergence of opinion between Mr. Justice Kirby and his colleagues on the High Court of Australia in *Ebner*.

The majority opinion of Gleeson C.J. and McHugh, Gummow and Hayne JJ. stated that . . . where, as here, it is clear that the outcome of a case would have no bearing upon the value of the shares held by the judge in the listed public company, and there is no other suggested form of pecuniary interest involved, then the judge does not have a direct pecuniary interest in the outcome of the litigation. 69 Madame Justice Gaudron, in a concurring opinion, also took the view that in normal circumstances the relevant question is whether the litigation would be likely to affect the value of the judge’s shares in the company.

Thus, she stated:

> Although a judge may have a pecuniary interest in the form of shares or other financial interest in a public company that is party to proceedings before him or her, that does not necessarily mean that he or she has a pecuniary interest in the outcome of those proceedings. 70

She would have added a proviso, however, that if a judge has a sufficiently substantial shareholding in a company that is a party to the litigation, the judge should be disqualified. 71 For Mr. Justice Kirby, on the other hand, the relevant point was whether or not the judge had a financial interest in the form of a shareholding in a company that was a party to the proceedings before him or her. He acknowledged that there were circumstances in which a company in which the judge held shares was connected with the litigation in a sufficiently indirect manner that the judge’s interest in the litigation could be said to be remote or insubstantial. 72 He parted company with his colleagues, however, by reaching the conclusion that a judge ought to be disqualified from hearing a case in which he had a significant shareholding in a bank that was a party to the dispute, even though there was no suggestion that the value

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68 Supra note 3 at para. 167.
69 Ibid. at 657-58, para. 55.
70 Ibid. at 665, para. 92.
71 Ibid. at 66, paras. 97-98. In the *Clenae* case, the companion case to *Ebner*, the judge had inherited 2400 shares in the bank. The shares fluctuated in value and at their highest were worth $11.45 per share. At the relevant time there were more than 1508 million ordinarily issued shares in the bank and more than 130,000 shareholders. The bank’s net assets were on the order of $8000 million. (See the majority judgment at 649, para. 17). Gaudron J. concluded that a shareholding of this size should not be regarded as substantial. Ibid. at 666, para. 100.
72 Ibid. at 688, paras. 174-75. In the particular facts of the *Ebner* case, the judge was a director and beneficiary of a family trust that owned shares in a bank. The bank was not a party to the proceedings, but was a major creditor of a party to the proceedings and was involved in financing the litigation. Kirby J. agreed with the majority that this was not a case where the judge should be disqualified.
of the shares could have been affected by the outcome of the case. It is clear that for Mr. Justice Kirby, the issue of whether or not a shareholding is "significant" can be a function of the dollar value of the shares alone. While Madame Justice Gaudron's reasons are not entirely clear on this point, the implication I draw from them is that the primary consideration is not the dollar value of the shareholding, but the question of whether the shareholding is sufficiently large as a percentage of the shares that have been issued that the judge could reasonably be identified with the company in the sense of being a significant investor.

The position taken in the Canadian Judicial Council's Ethical Principles for Judges is that the general rule with respect to disqualification because of the judge's financial interest "applies whether the interest is itself the subject matter of the controversy or where the outcome of the case could substantially affect the value of any interest or property owned by the judge, the judge's family or close associates." In the case of litigation in which a publicly traded company, in which the judge holds shares is a party, it seems to me that the relevant question that flows from this test is whether the outcome of the litigation could substantially affect the value of the judge's shares. Even if we concede that we do not want to judge with too fine a hand the question of whether or not a judge's financial interest was sufficiently large that it might affect his or her judgment, the authorities on remoteness would appear to suggest that the relevant inquiry is whether or not there is any realistic prospect that the judge's decision could enure to his or her financial benefit. In my own view, that question is more accurately addressed by examining the likely impact of the outcome of the litigation on the value of the investment than it is by considering the size of the investment itself as the determining factor. That having been said, it is possible that Canadian courts would also be inclined to accept Madam Justice Gaudron's proviso that if the judge's shareholding is sufficiently large, the judge should be disqualified even if the dispute itself would have no impact on the value of the shareholding.

Finally, it is useful at this point to make some observations about the doctrine of necessity. What happens when everyone who is in a position to judge a case has a direct financial interest in the outcome? This has occurred in cases where courts have been called upon to determine whether judicial salaries are liable to taxation, and more recently, in relation to the constitutional validity of the regimes used to establish

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73 ibid. at 689, paras. 176-77. Kirby J. was of the view that the shareholding in the Clenae case referred to above at note 67 was "substantial" in the sense that the value of the investment itself (over $25,000) could not be dismissed as "de minimis".

74 Canadian Judicial Council, Ethical Principles, supra note 59 at 42.

judicial salaries.76 Where this has happened, the courts have invoked the doctrine of necessity to enable a person, who would otherwise be disqualified, to render a decision. The Supreme Court of Canada has made it clear, however, that the doctrine of necessity should not be applied mechanically. In particular, it should not be used if the result would be to promote a substantive injustice, and its application should be strictly limited to the extent that the need to prevent a failure of justice requires.77

V. Personal Interests of a Non-Financial Nature

The second type of situation in which an apprehension of bias may be found to be reasonable is where the judge has a sufficiently close personal relationship with someone involved in the proceedings that a reasonable person would believe that the judge’s impartiality is impaired. Typically, these situations involve relationships with a party to the dispute, but they can also involve relationships with someone else who has a significant interest in the proceedings, such as legal counsel or an important witness. Once again, many of these conflict of interest situations (those where immediate family members are parties, for example) are relatively straightforward and the prohibitions on acting as a decision maker in these situations are fairly automatic.78 Indeed, I would argue that the existence of a blanket disqualification requirement in these situations is designed as much to protect the judge from being put in a position that might cause harm to his or her personal relationships as it is to bolster public confidence in impartial decision-making. In other situations, however, the boundary between a relationship that is too close for comfort and one for which it is unreasonable to demand that judges disqualify themselves is much less clear.

Since a judge’s obligation to be impartial is absolute,79 it seems to me that in circumstances where a judge has reason to doubt his or her own capacity to adjudicate impartially, the only proper course of action is not to sit. This aspect of the disqualification decision is subjective, in the sense that the judge is not addressing the question of whether others would doubt his or her capacity to adjudicate impartially, but whether the judge personally harbours such doubts. In commenting on the difficulty judges have in determining when a friendship or other relationship is sufficiently close that disqualification should result, the Canadian Judicial

Council's *Commentaries on Judicial Conduct* observes: "One experienced judge said to us that the test is essentially subjective. 'If you feel uncomfortable about the situation', he said, 'then you should step down.'" This aspect of judicial disqualification is seldom discussed, but it may represent an argument in support of the view that the decision about whether or not to sit on a case should be made by the judge personally and not by anyone else.

A number of factors appear to be relevant in determining whether a particular marginal case is one where disqualification is required or one where it is not. The first is whether the relationship is a current one or one that existed in the past. My own view is that this consideration is sufficiently important that it justifies separating current and past relationships into two distinct categories. As I noted above, part of the rationale for disqualification of judges who have relationships with persons involved in the litigation before them is to prevent awkwardness for the judge in his or her personal life. Obviously this consideration is more significant with respect to the judge's ongoing relationships than it is with respect to past relationships.

The second important consideration is whether the relationship in question is a business or professional one, as opposed to a family relationship or a friendship. Business or professional relationships can sometimes give rise to a reasonable apprehension of bias, but in such situations courts are much more likely to assess carefully whether the nature of the relationship is such as to give rise to real concerns about the decision maker's impartiality. In some jurisdictions at least, the professional context in which a judge is interacting with a family member will be seen to remove a potential concern about bias. In the *S.A.R.F.U.* case, for example, the South African Constitutional Court did not regard

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79 See the observations of L'Heureux-Dubé, J. in *Régie* at notes 32 and 33 above.
80 Canadian Judicial Council, *Commentaries*, supra note 42 at 64. See also Canadian Judicial Council, *Ethical Principles*, supra note 59 at 29.
81 Compare the reasons of Gleeson, C.J. and McHugh, Gummow and Hayne JJ. for the majority of the Australian High Court in *Ebner*, supra note 2 at para. 74 on this point with those of Callinan J., at para. 153. He agreed with the majority on the disposition of the appeals in the case but suggested that it would be preferable if the decision were made by another judge. Articles 238-41 of the Quebec *Code of Civil Procedure*, supra note 14, contemplate a procedure in which decisions concerning applications for recusation are made by another judge. The issue of who should decide applications for judicial disqualification is discussed below in Part III.
it as a ground for disqualification that the son of one of the judges was a member of the appellant’s legal team. The court observed that “it has been accepted practice in our courts for many decades that close family members appear before each other and it has never before been suggested that it was inappropriate.”84 This does not seem to be the view held in Canada,85 and it may be influenced by the division in the South African legal profession between barristers and solicitors.86 Nevertheless, our courts do accept the proposition that where the professional connection of a judge’s family member with the litigation is sufficiently remote, this does not form a basis for disqualification.87

The third consideration is the depth of the relationship. This is especially true of the types of social relationships that judges will inevitably have. For example, the English Court of Appeal in Locabail took the view that a judge’s mere membership in the same social, sporting or charitable body as a participant in the litigation could not, at least under ordinary circumstances, form the basis for disqualification.88 The context in which a social relationship arises will be significant as well. In the S.A.R.F.U. case, the respondent in an appeal before the South African Constitutional Court in which South African President Mandela was both a party and a witness whose evidence had been criticized by the judge at first instance, asked six members of the Court to recuse themselves. A number of grounds were offered for this extraordinary application, including the personal relationship between President Chaskalson of the South African Constitutional Court and President Mandela. One aspect of this relationship was that many years earlier, when President Chaskalson was a barrister, he had represented Mr. Mandela. I will deal with this point in the next section of the paper. The applicant also submitted, however, that President Chaskalson’s ongoing personal relationship with President Mandela gave rise to a reasonable apprehension of bias, an argument which the Court rejected. The Court held that the mere fact that President Mandela had attended a public function honouring President Chaskalson prior to the latter’s appointment to the Court was not a basis for disqualification.89 Likewise, a single social visit by President Chaskalson to the home of President Mandela and the fact that President Mandela, along with some 300 other guests, attended the wedding of President Chaskalson’s son did not constitute the type of friendship or personal relationship that gave rise to judicial disqualification.90 The Court took the view that the relationship between the two men was a

84 Supra note 11 at para. 84.
85 See Canadian Judicial Council, Commentaries, supra note 42 at 64-66.
86 See S.A.R.F.U., supra note 11 at para. 79.
88 Supra note 21 at para. 25.
89 S.A.R.F.U., supra at note 11 at para. 81.
90 Ibid. at paras. 80-83.
"cordial and formal one" rather than the kind of personal relationship that would give rise of a reasonable apprehension of bias.

Even when all these considerations have been taken into account, however, there will be times when the line between a casual social relationship that does not form the basis for disqualification and a friendship that does give rise to a reasonable apprehension of bias will be difficult to draw. Indeed, in a survey of American judges invited to identify the most difficult disqualification decisions they faced involving relationships, situations where a party, witness or victim was a "friend or acquaintance" topped the list by a considerable margin.

VI. Past Associations with Litigants or their Representatives

It is almost inevitable that prior to their appointment to the Bench, judges will have had professional relationships with other lawyers and with clients. It is also the case that they will, not infrequently, have been engaged in some form of public service, whether political or otherwise, that identifies them with certain groups or causes. Upon appointment, a judge severs his or her professional and political associations and is cautioned to be circumspect in relation to the type of charitable, service and social activities in which it is appropriate for a judge to be engaged. I have addressed above the extent to which a judge's ongoing relationships can form the basis for disqualification from hearing a particular case. What, however, can be said about the extent to which a judge's past relationships can form the basis for a "reasonable apprehension of bias"?

First, it is important to distinguish situations where the judge's prior activities have given him or her access to extra-judicial knowledge of the

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91 Ibid. at para. 80.
92 For examples of Canadian cases in which courts have found that the relationship between the judge and someone involved with the litigation was too remote to form a basis for disqualification, see Banyay v. Insurance Corp. of British Columbia (1996), 17 B.C.L.R. (3d) 216 (C.A.) (trial judge was a neighbour of the parents of counsel for the defendant and counsel was also a boyhood friend of the judge's son); Huchette v. Québec (1992), 12 C.R. (4th) 393 (Que. C.A.) (trial judge was married to an executive of the provincial police; alleged police misconduct was an issue in the case but the trial judge's wife had no involvement with the incident).
93 J. Shaman and J. Goldschmidt, Judicial Disqualification: An Empirical Study of Judicial Practices and Attitudes (Chicago: American Judicature Society, 1995) at 56. Of the 126 responses to this question, 53 (or 42%) identified this type of decision as the most difficult one. The next most difficult decision was where a party was a former client (this situation was identified by 20 of the survey respondents (16%)) and this was followed by situations where the attorney was from the judge's former firm (identified by 13 survey respondents (10%)). No other situation was identified by more than 6 survey respondents.
94 See Canadian Judicial Council, Ethical Principles, supra note 59 at 27-29; Canadian Judicial Council, Commentaries, supra note 42 at 17-27, 31-33.
facts underlying the dispute that is presently before the court from situations where this is not the case. I will deal with the former type of case in the next section of this paper.

Second, it seems to me that the reported decisions draw a distinction between past activities or relationships that might betoken a general sympathy with a particular party or point of view and a specific relationship that might indicate support or animosity toward a party. While Mr. Justice Bastarache’s reasons for judgment in Arsenault-Cameron v. Prince Edward Island provide little in the way of detail concerning the allegations that formed the basis for the unsuccessful motion that he recuse himself in that case, it would appear that the application was based, at least in part, on Mr. Justice Bastarache’s role as counsel in language rights cases prior to his appointment to the Bench. Mr. Justice Bastarache, quite properly in my respectful view, refused to disqualify himself on this ground. Likewise, the South African Constitutional Court in the S.A.R.F.U. case refused to countenance the disqualification of members of the court merely because of their active involvement with the African National Congress prior to their appointment to the Bench. The relevant principle in both of these cases, it seems to me, is the one addressed below in relation to extra-judicial statements, which is that we do not expect judges to be devoid of sympathies or opinions but to be open to persuasion in relation to them.

Finally, it is worth noting that even in the types of situations where a past professional or personal relationship might be a cause for concern, the passage of time is a relevant consideration. Thus, judges often disqualify themselves from hearing cases involving former clients or former law partners even when they have had no personal involvement with the litigation itself, but it is generally thought that this obligation dissipates with the passage of a reasonable period of time. In the S.A.R.F.U. case, for example, President Chaskalson had, in the past, acted as counsel for both President Mandela and his former wife, Winnie Mandela. President Chaskalson’s professional relationship with Mr. Mandela had ended 35 years ago and he had ceased to act for Mrs. Mandela more than 25 years earlier. The Court did not regard either relationship as a basis for disqualification.

96 Supra note 11 at paras. 70-76 and para. 96.
98 See Committee for Justice and Liberty v. National Energy Board, supra note 9 at 388, cited in Canadian Judicial Council, Ethical Principles, supra note 41 at 69. See also Canadian Judicial Council, Commentaries, supra note 58 at 47, in which the suggestion is advanced that a “cooling off” period is often established on the basis of local tradition at 2, 3 or 5 years.
99 S.A.R.F.U., supra note 11 at para. 79. For an analogous Canadian example, see R.
VII. Extra-Judicial Knowledge of or Involvement with the Litigation Itself

The fourth area in which a successful disqualification argument can be made is where a judge has extra-judicial knowledge of the facts of the case or has been involved in the case in some way other than his or her present capacity as judge. Two considerations are relevant here. The first is that the information that the judge possesses may undermine the requirement that the decision be based exclusively on the record before the court. The second is that the judge may have formed views about the litigation that will be difficult to dislodge, and that it is unfair to impose a burden on the parties to dislodge them.

The Supreme Court of Canada’s decision in Committee for Liberty and Justice v. National Energy Board\(^{100}\) represents a watershed in the law’s approach to this type of question. In that case, Marshall Crowe, the Chair of the National Energy Board, was a member of a panel hearing an application for approval of a pipeline in the Mackenzie River Valley. Prior to becoming a member of the Board on 15 October 1973, Mr. Crowe had been president of the Canada Development Corporation, and its representative in a Study Group of companies that were exploring the feasibility of constructing a natural gas pipeline in northern Canada. The result of the Study Group’s work was the creation of Canadian Arctic Gas Pipeline Ltd., which on 21 March 1974 filed with the Board the application in question for approval of its pipeline proposal. The parties to the hearing were informed of Mr. Crowe’s involvement in the pipeline proposal as a result of his role with the Canada Development Corporation. Of the 88 parties to the hearing, 80 indicated that they had no objection to Mr. Crowe presiding over the hearings. The Board ruled that Mr. Crowe could preside over the hearings, and on a reference to it made by the Board pursuant to section 28(4) of the Federal Court Act, the Federal Court of Appeal unanimously agreed.\(^{101}\) By a 5-3 majority, however, the Supreme Court of Canada disagreed and ruled that Mr. Crowe’s involvement in the application at an earlier stage gave rise to a reasonable apprehension of bias on his part.

The dominant consideration affecting the reasons for judgment of Chief Justice Laskin, writing for the majority, was “that there be no prejudgment of issues (and certainly no predetermination) . . . “\(^{102}\) In Chief Justice Laskin’s view, “the participation of Mr. Crowe in the discussions and decisions leading to the application made by Canadian

\(^{100}\) Supra note 10.

\(^{101}\) [1976] 2 F.C. 20 (C.A.)

\(^{102}\) Supra note 10 at 391.
Arctic Gas Pipeline Limited . . . cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined . . .". 103 Chief Justice Laskin, in other words, took the view that this situation was analogous to asking a judge to hear an appeal of his or her own judgment. 104 Mr. Justice de Grandpré in dissent took the view that reasonable people would accept that Mr. Crowe was able to distinguish his role as a member of the Study Group from his role as Chair of the National Energy Board and to adopt an open mind in the latter capacity.

In my own view, there is little doubt that Canadian courts would reach the same conclusion as the majority, if the same case were to arise today. I would think, however, that the possibility that Mr. Crowe would have access to information not found in the record would play a more significant role in the justification of the outcome. For example, in R. v. Catcheway 105 the Supreme Court of Canada ordered a new trial for the appellants on a charge of mischief relating to the blockade of a provincial highway. The Crown conceded that there was a reasonable apprehension of bias on the part of the trial judge in that case. The Court accepted this concession on the basis of the observations made by Crown counsel that the trial judge “had professional dealings with some of the appellants while he was still a practising lawyer” and, more importantly, that “[o]f great concern is the fact that the trial judge, while still a practising lawyer, acted for a co-accused (who was not tried before him) on a bail application, and apparently had access to the full police report respecting the accused who would eventually appear before him at trial”. 106

**VIII. Statements or Conduct that Might Indicate Pre-disposition**

The final situation where disqualification arguments may succeed is where the judge has made some form of statement or engaged in behaviour that would lead a reasonable observer to conclude that the judge was either incapable of acting impartially or had failed in his or her duty to act impartially. Such statements or conduct by the judge can occur either before the hearing takes place, 107 during the course of the hearing

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103 Ibid.
104 See Bennett v. B.C. Securities Commission (1994), 30 Admin. L.R. (2d) 283 (B.C.C.A.) for an example of a decision finding that such a situation is permissible.
106 Ibid. at para. 4. For other examples of judicial disqualification where a judge has had off-the-record access to information about the case, see R. v. Hayward (1997), 31 O.T.C. 150 (Ont. Gen. Div.) and R. v. Ewen (1994), 98 Man. R. (2d) 1 (Q.B.). Indeed, even the possibility that a judge may have had off-the-record discussions about the case can form the basis for disqualification. See R. v. Laframboise (1997), 200 A.R. 75 (C.A.).
itself,\textsuperscript{108} outside the hearing,\textsuperscript{109} or in the course of delivering reasons for

decision.\textsuperscript{110}

It is helpful to distinguish two types of situations that often arise in
this context. The first is where judges bring to their adjudicative role
experience or views that may indicate a leaning in respect of certain legal
or policy issues, the resolution of which is likely to have a significant
impact on the outcome of the case.\textsuperscript{111} The tension here is between our
desire to make use of judges who have relevant experience (and are likely
to carry with that experience certain views) and our desire to convince the
parties and the public that the persons who are called upon to make
decisions in an adjudicative capacity will do so impartially. In large
measure, for the reasons I canvassed earlier in my extended discussion of
the \textit{R.D.S.} case, Canadian courts have tended to resolve this tension in
favour of the virtues of experience, as opposed to the virtues of perceived
impartiality. Thus, courts and tribunals have been reluctant to disqualify
decision-makers simply because of their advocacy activities undertaken
prior to joining a court or tribunal,\textsuperscript{112} their political activities prior
to appointment to the Bench,\textsuperscript{113} their involvement at an earlier stage
in their career with an organization that has expressed negative views
about a party,\textsuperscript{114} their academic writings,\textsuperscript{115} or their decisions in earlier

\textsuperscript{108} See, for example, \textit{Beno v. Canada (Somalia Inquiry Commission)}, [1997] 2 F.C.
N.B.R. (2d) 88 (Q.B.).

\textsuperscript{109} See, for example, \textit{Canada (Minister of Citizenship and Immigration) v. Tobias},

\textsuperscript{110} See, for example, \textit{R.D.S.}, supra note 6; \textit{Baker v. Canada}, supra note 50.

\textsuperscript{111} See, for example, \textit{Arsenault-Cameron v. Prince Edward Island}, supra note 95.

11; \textit{Elis-Don Ltd. v. Ontario (Labour Relations Board)} (1992), 98 D.L.R. (4\textsuperscript{th}) 762 (Ont.
Div. Ct.).

\textsuperscript{112} See \textit{Arsenault-Cameron v. Prince Edward Island}, ibid.; \textit{Newfoundland Telephone

\textsuperscript{113} See \textit{Buffalo v. Canada (Minister of Indian Affairs and Northern Development)}
70-76; \textit{Locabail}, supra note 21 at para. 25.

\textsuperscript{114} See \textit{Zandel v. Citron}, supra note 97.

\textsuperscript{115} \textit{Arsenault-Cameron v. Prince Edward Island}, supra note 94; \textit{Large v. Stratford}
C.A.), rev'd on other grounds, [1995] 3 S.C.R 733. The English courts may take a
somewhat stricter view than Canadian courts on this issue. In \textit{Timmins v. Gormley}, one of
the companion cases to \textit{Locabail}, supra note 20, the Court of Appeal did find that certain
observations made by the recorder in publications on insurance law gave rise to a real
danger of bias against the insurers in the case heard by him. The court stated that the case
had caused “particular concern” (para. 71) and that the mere fact that a judge had
cases.\textsuperscript{116} The expression of policy views that are considered incompatible with the nature of the function allocated to the decision maker has, however, been treated as the basis for finding a reasonable apprehension of bias.\textsuperscript{117}

This brings us to the second type of situation, which involves conduct or remarks that are connected more directly with the case or the parties themselves. Judges are required to refrain from expressions of personal animosity or other forms of conduct that could be construed as descending into the fray, or otherwise revealing an unwillingness to give a party a fair opportunity to persuade the judge of the merits of the case.\textsuperscript{118} This does not mean that a judge cannot ask questions,\textsuperscript{119} or express disbelief of evidence being given by a witness,\textsuperscript{120} or indicate a tentative view of how he or she is inclined to decide an issue in dispute.\textsuperscript{121} They key point is that in doing these things, the judge must take care not to cross the line into a position where he or she is reasonably viewed as an advocate, rather than as an impartial adjudicator.

The difficulties that courts and tribunals experience in drawing these distinctions bring me back to the observations I made earlier in my general discussion of the concept of impartiality. We know that the preexisting views decision makers have on a variety of important subjects will exert a significant, and in some instances determinative, influence on the outcome of certain cases. It is not clear that we would be better served by judges who did not have the benefit of these experiences and views, even if we could find them. Nevertheless, there is some discordance between our tendency to treat financial and other types of interest in a dispute as automatic sources of disqualification, in order to avoid even the appearance of partiality, and our willingness to tolerate a situation in

expressed views on a subject in his or her capacity as an author would not automatically give rise to a real danger of bias. See \textit{ibid.} at para. 25. According to the court: "It is the tone of the recorder's opinions and the trenchancy with which they were expressed which is challenged here. Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicate that he has preconceived views which are so firmly held that it may not be possible for him to try a case with an open mind." \textit{ibid.} at para. 85.


\textsuperscript{117} See \textit{Baker v. Canada, supra} note 50.


\textsuperscript{120} See \textit{Beno v. Canada, supra} note 108; \textit{R. v. Berton}, \textit{supra} note 108.

which decisions appear to be driven, at least in part, by the personal beliefs of the decision-makers. In the minds of some disputants at least, it must seem that Canadian law is more interested in the appearance of impartiality than in the reality of it. These doubts do not do justice to the commitment that Canadian judges have to behaving impartially in carrying out their judicial responsibilities and the role the law plays in reinforcing that commitment. At the same time, if we must recognize that our law requires parties to take on faith to some extent the ability of our judges to be open-minded in deciding cases that require them to examine their own views and pre-dispositions, there is a certain irony in our reluctance to require parties to accept the ability of judges to act impartially when relatively insignificant personal interests are at stake. As the law stands at the moment, and I say this with respect, it seems to me that it might be difficult to persuade a lay observer that there is no tinge of hypocrisy in the way our legal system approaches the issue of impartiality.

IX. Procedural Issues Concerning Recusal of Judges

From a procedural standpoint, questions about the disqualification of a judge from sitting on a particular case can occur in four different settings. First, a judge, without consulting the parties, may decide to withdraw from a case to which he or she has been assigned prior to the commencement of the hearing. Second, the judge may, on his or her own initiative, seek submissions from the parties on whether or not to withdraw. Third, a party (or, in rare instances, more than one party) may seek to have the judge withdraw. Finally, a party against whom a judgment has been rendered may seek to have that judgment invalidated on the basis that the judge should have been disqualified.

From a purely procedural standpoint the first and fourth situations seem to be relatively straightforward. The reason for this is that, in the first type of situation, the parties play no role in the process, and in the fourth, the procedural regime is dictated by the ordinary rules of appellate procedure. The second and third types of situations do, however, raise special considerations. In the second type of procedural setting, these special considerations flow mainly from the doctrine of waiver. Normally, courts are extremely reluctant to conclude that a party’s participation in a hearing constitutes a waiver of any of the elements of a fair hearing, including the right to an impartial decision maker.122 In administrative law, however, situations have arisen where one of the parties knows of a basis for disqualification of a decision maker, or the decision maker asks the parties to an adjudication whether a particular situation requires the decision maker to disqualify himself or herself.

no objection is raised at this point, Canadian courts in administrative law cases have concluded that the parties have waived their right to pursue the issue on a subsequent appeal or application for judicial review of the decision. The party must, however, have made a deliberate and voluntary decision to waive the possible objection and must have had full knowledge of the relevant facts.

The English Court of Appeal in Locabail was quite forceful in its view that the waiver doctrine applies with equal force in the judicial arena. Thus, the court stated:

If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias.

The High Court of Australia in Ebner also concluded that the failure of counsel to object, when a judge disclosed a shareholding in a company involved in a case, would result in a waiver of the right to raise the issue in subsequent proceedings. The High Court took the view that disclosure by the judge was a "matter of prudence and professional practice", but also indicated that a judge's failure to draw to the attention of the parties the fact that he held shares in a corporation that was a party to the litigation before him did not constitute a breach of the rules of natural justice. The authors of the Canadian Judicial Council's Commentaries on Judicial Conduct were, however, less sanguine about the virtues of curing disqualification by disclosure. The committee was divided on the

49 D.L.R. (3d) 295 (F.C.T.D.). The Saskatchewan Court of Appeal in Milne v. Joint Chiropractic Professional Review Committee (Saskatchewan) (1991), 90 D.L.R. (4th) 634 (Sask. C.A.) took the position that since bias went to a tribunal's jurisdiction it could not be waived. This approach goes against the weight of authority, however.


125 Supra note 21 at para. 26. Contrary to the views expressed in the Canadian Judicial Council's Commentaries on Judicial Conduct discussed below, the English Court of Appeal in Locabail stated: "We do not consider that waiver, in this context, raises special problems..." Ibid.

126 See Ebner, supra note 3 at 659-60, para. 71 (per Gleeson, C.J.) et al. For the majority and at 687-88, para. 171 (per Kirby J., dissenting in part, but not on this issue).

127 Ibid. at 659, para. 69.

128 Ibid. at 660, paras. 70-73. Mr. Justice Kirby took the view that non-disclosure was relevant to the appropriate choice of remedy (see 689, para. 177), and he was, if
question of whether or not it was proper to ask counsel if they consented to have the judge hear the case in a situation in which there might be some basis for disqualification.\textsuperscript{129} The basis for the committee’s concern was that the judge’s request may be perceived to put pressure on counsel to grant their consent. Geoffrey Lester suggests that the judge ought to make every effort to ensure that the judge’s request is construed as a request for submissions rather than an attempt to procure consent,\textsuperscript{130} but one may be forgiven for wondering how much comfort this provides counsel. That being said, I have to assume that counsel in England and Australia face a similar dilemma, and whatever sympathy the courts in those countries have for counsel in this situation does not appear to have deflected them from adopting a relatively robust waiver rule.

The authors of Ethical Principles for Judges took the view that “The better approach is for the judge to make the decision without inviting consent, perhaps in consultation with his or her chief justice or other colleague.”\textsuperscript{131} The authors made two exceptions to this rule. “The first arises if the judge has any doubt about whether there are arguable grounds for disqualification. The second is if an unexpected issue arises shortly before or during a proceeding. The judge’s request for submissions should emphasize that it is not counsel’s consent that is being sought but assistance on the question of whether arguable grounds exist for disqualification and whether, in the circumstances, the doctrine of necessity applies.”\textsuperscript{132}

The question of what ought to happen, from a procedural standpoint, when counsel wishes to request that a judge recuse himself or herself, is addressed in some detail by Mr. Lester in the article referred to above. He raises a variety of interesting issues, but it is sufficient for present purposes to address two of them. The first is what form such a proceeding ought to take, and more particularly whether a party may make an application by way of a motion requesting that the judge stand down, or whether some other form of procedure is more appropriate. The second is, whatever form such a proceeding ought to take, who ought to hear and make a decision concerning the request. This issue has two parts, the first being what ought to happen when the judge is sitting alone, and the second being what ought to happen when the judge is sitting on a multi-member panel.

Turning to the first issue, Mr. Lester acknowledges that the normal

\begin{enumerate}
\item \textsuperscript{129} Canadian Judicial Council, Commentaries, supra note 42 at 72-74.
\item \textsuperscript{130} Lester, supra note 9 at 24 at 337.
\item \textsuperscript{131} Canadian Judicial Council, Ethical Principles, supra note 59 at 45, para. E.15.
\item \textsuperscript{132} Ibid. at 45, para. E.16.
\end{enumerate}
practice in Canada is for the court in question to entertain a motion that a judge disqualify himself or herself and stand down. 133 He also makes note of at least one case134 in which an interlocutory appeal was heard from a trial judge’s decision to refuse to recuse himself, albeit without objection from the respondent to the use of this procedure. Mr. Lester’s view is that a motion of this nature is not cognizable and that any decision by a judge refusing such a motion is not subject to an interlocutory appeal. His position is that the proper practice is to make an application from the bar table, though he also suggests that a preferable alternative would be for the party seeking the disqualification of the judge to make a motion for an order that the matter be adjourned and re-listed before another judge or before a differently constituted court.135

The basis for Mr. Lester’s opinion appears to be twofold. The first is a principled view that the judge, in deciding whether or not to recuse himself or herself, is not exercising a judicial power, and therefore is incapable of making an order that is subject to appeal. The second is the practical point that there will be evidentiary difficulties if the judge seeks to rely, as will sometimes be the case, on his or her own statement of the facts in relation to a controverted issue. It is certainly the case that the common practice when a party raises an issue concerning disqualification on the basis of a judge’s financial holdings or personal relationships is for the judge to issue a statement disclosing his or her understanding of the true state of affairs.136 Such a statement is not made by way of affidavit and the judge is not, of course, subject to questioning in relation to it. Such a state of affairs is problematic, in Mr. Lester’s view, because a motion ought to be decided on the basis of admissible evidence, and the judge may be placed in the awkward (some might say untenable) position of ruling on the admissibility of any evidence submitted by the party making the application and deciding whether or not to prefer that evidence to his or her own statement.

It is, no doubt, unwise for an academic who is not as fully conversant as Mr. Lester with the intricacies of civil procedure to offer a defence of the current practice in Canada, but I will nevertheless do so. First of all, as Mr. Lester would be the first to acknowledge,137 it is highly desirable that our system of justice have in place a clear and relatively straightforward procedure whereby parties may make an argument concerning the disqualification of a judge in advance of a trial. Indeed, if the waiver

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133 Lester, supra note 9 at 342, at which point Mr. Lester offers a number of examples of this practice.

134 Buffalo v. Canada, supra note 113.

135 Supra note 9 at 342-47.

136 See, for example, Ebner, supra note 3; Pinochet, supra note 3; S.A.R.F.U., supra note 11; and the practice adopted by Teitelbaum J. of the Federal Court, Trial Division in the Buffalo case, supra note 113.

137 See Lester, supra note 9 at 346-47.
doctrine is to be taken seriously, it is vital that parties have an early opportunity to make such an argument and not be forced to wait until the case has been decided and raise “reasonable apprehension of bias” as a ground of appeal. It is also highly desirable, I should have thought, that any decision a judge may make in relation to such an argument be one that is supported by written reasons. It is for these reasons that Mr. Lester offers the expedient of a motion to adjourn and have the matter heard by a different judge or a differently constituted court.

With the greatest of respect, however, it seems to me that the alternative offered by Mr. Lester is subject to the same principled and practical shortcomings he identifies in relation to the current practice of hearing a motion requesting that the judge recuse himself or herself. In other words, if a judge cannot “order” himself or herself not to sit on a case, it is not obvious that a judge can “order” a Chief Justice to assign another judge to hear the matter. Likewise, the practical evidentiary problems presented by a judge’s statement of his or her version of the underlying facts of the matter are not resolved by changing the nature of the application or even, I would argue, by changing the judge who hears the matter. If, for very good reasons, we are unwilling to allow the judge’s statement of the facts to be subject to cross-examination, we have already compromised the ability of the parties to contest the judge’s factual assertions effectively. 138 This may be a matter of regret for some litigants, but it seems to me that these concerns are not sufficient for us to alter fundamentally the way in which we currently approach the establishment of a factual foundation on which we address the legal question of whether or not a judge ought to be disqualified in any particular case. If we need to have some way of dealing with requests for recusation, and no obviously superior alternative presents itself, I would have thought that

138 An interesting parallel has arisen recently in the administrative law arena. In Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 S.C.R. 221, a majority of the Supreme Court of Canada held that the principle of deliberative secrecy prevented a party from seeking to examine members of the Board concerning what had happened at a full Board meeting in which a case involving the party was discussed. The net effect was that the party was unable to mount a successful argument that the Board had violated the rules governing the limits on full Board consultations laid down in IWA v. Consolidated-Bathurst Packing Ltd., [1990] 1 S.C.R. 282. The minority accepted the Board’s right to deliberative secrecy but took the view that the Board could not rely on this principle in order to undermine the ability of a party to effectively police the Board’s compliance with the rules of natural justice. The majority, in my respectful view correctly, recognized that there comes a point when the efficacy of our system of administrative justice requires us to take on faith the integrity of tribunal members and their willingness to comply with their legal obligations. This does not always sit well with those who have reason, at least in their own minds, to doubt that integrity and put it to the test, but it seems to me that the instinct of the majority that we have good reasons to control the efforts of litigants to conduct such tests was fundamentally sound. Needless to say, these reasons have equal force in the judicial forum.
the current practice has as much to recommend it as any.\footnote{139}{In making this observation I do not intend to suggest that there may not be virtue in developing explicit procedural rules to govern such applications, a point that I make below. In the absence of such rules, however, it seems to me that what Mr. Lester describes as the current practice has as much merit as any of the alternatives he puts forward.}

The second type of procedural issue raised by Mr. Lester is who ought to decide whether or not a judge should be disqualified from sitting. When a judge is sitting alone, Mr. Lester’s view is that the judge must decide the matter personally, because it would be an interference with judicial independence for a court administrator or another judge to decide that the judge could not sit.\footnote{140}{See Lester, supra note 9 at 338. Mr. Lester supports this proposition with reference to the opinion of Strayer, J. in Kibale v. Canada, [1991] F.C.J. No. 1014, (F.T.D.) (Q.L.). It could be argued that this view of the matter is inconsistent with the approach taken by the House of Lords in Pinochet, in that Lord Hoffman’s peers in the House of Lords were the ones who decided that it had been inappropriate for him to sit and invalidated the decision in which he participated as a result.} The practice of having the judge address the matter personally corresponds with my understanding of current practice in Canada outside the Quebec courts, and the majority in the Ebner case stated that it was “both the ordinary, and the correct, practice” in Australia.\footnote{141}{Ebner, supra note 3 at 661, para. 74.}

Cullinan J., who agreed with the majority in other respects, took the view that this placed the judge in “an invidious position” and stated: “If there is no legal inhibition upon it, and if it is convenient for it to be so made, I think it preferable that such a decision be made by another judge.”\footnote{142}{Ibid. at 691, para. 185.}

In the courts of Quebec, Chapter V of the Quebec Code of Civil Procedure\footnote{143}{Supra note 27.} regulates the procedure for the hearing of applications for recusation, and article 241 requires the matter to be be addressed by another judge.

Matters become more complicated when a party seeks to have one or more members of a panel of judges stand down from hearing the case. As Mr. Lester points out, it is possible to find examples of a variety of practices. These include having the entire court hear the matter, having all the judges on the panel except the judge whose recusation is sought address the issue, having the entire court hear argument but leaving the decision to the judge whose recusation is sought, and leaving the matter to be addressed exclusively by the judge or judges whose recusation is being sought.\footnote{144}{Lester, supra note 8 at 338-41 and the cases cited therein.}
reasons for this decision were delivered by Bastarache J. alone.\textsuperscript{146} The reasons themselves make no reference to why this particular procedure was adopted, and Mr. Lester offers other examples in which the Supreme Court has employed different procedures in the past.\textsuperscript{147}

One court that has addressed this issue expressly is the South African Constitutional Court in the \textit{S.A.R.F.U.} case.\textsuperscript{148} In that case, it will be recalled, there were applications for recusal of five members of the court and further allegations and complaints made against all ten members. Counsel agreed, and the court accepted, that all of the applications should be heard simultaneously by the entire court.\textsuperscript{149} The court made the following observations concerning its reasons for adopting this procedure:

\begin{quote}
Judges have jurisdiction to determine applications for their own recusal. If a Judge of first instance refuses an application for recusal and the decision is wrong, it can be corrected on appeal. But no provision exists in any law for an appeal against a decision of this Court. As the ultimate Court of appeal in constitutional matters, this is the only Court which has the power to set aside one of its judgments or to correct an error made by it. Whether such a power exists, and if so, in what circumstances it would be exercised, need not be decided in the present case, for this Court clearly has a duty to act constitutionally. If one or more of its members is disqualified from sitting in a particular case, this Court is under a duty to say so, and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case.

If one Judge, in the opinion of the other members of the Court, incorrectly refuses to recuse herself or himself, that decision could fatally contaminate the ultimate decision of the Court, and the other members may well have a duty to refuse to sit with that Judge.\textsuperscript{150}
\end{quote}

Interestingly, the court appeared to regard the constitutional nature of its obligation to provide the litigants with an impartial forum as significant in its choice of procedure. Although the court did not express a firm opinion on this point, it did make note of counsel's submission that, to the extent the doctrine of recusal is understood to be part of the common law,

\begin{quote}
if a Judge, in the opinion of the other members of the Court, incorrectly refuses to recuse herself or himself, that decision could fatally contaminate the ultimate decision of the Court, and the other members may well have a duty to refuse to sit with that Judge.\textsuperscript{150}
\end{quote}

each of the five Judges whose recusal was sought was required to deal with the application insofar as it applied to him personally. Although the Judges would be

\textsuperscript{145} Supra note 95.
\textsuperscript{146} Lester, supra note 9 at 340.
\textsuperscript{147} Ibid. at 339-40.
\textsuperscript{148} Supra note 11.
\textsuperscript{149} Ibid. at para. 26.
\textsuperscript{150} Ibid. at paras. 31-32.
entitled to consult their colleagues on the issues raised in argument, the decision on the applications against each of the Judges should in each instance be theirs alone.\textsuperscript{151}

Once again, it may be unwise for an academic commentator to offer an opinion where so many learned judges have been unable to come to a consensus, but I will venture to do so, if only to stimulate debate. It seems to me that one of the signal advantages of the "reasonable apprehension of bias" test is to transform, insofar as it is possible to do so, what might otherwise be perceived as a challenge to a judge’s personal integrity into a more general legal inquiry about how a reasonable person would view the judge’s situation. In other words, the law tries to depersonalize the challenge and turn it into a question of law, or at least mixed fact and law. If a recusal application can be viewed in this way, it seems to me that our system of procedure should reinforce this perception by treating this type of application like any other general question of law. That is to say, that it is to be decided by the judge personally if he or she is sitting alone, and to be decided by the entire panel if the application is made in respect of one or more members of a multi-member court. I recognize that this is difficult to reconcile with recent practice at the Supreme Court of Canada, especially in the Arsenault-Cameron case, but I am comforted by the fact that it is consistent with the approach taken by the South African Constitutional Court in S.A.R.F.U., which turned its mind expressly to the question.

Whatever one thinks of Mr. Lester’s views (or my own views, for that matter) on the procedural issues that can arise when questions of judicial disqualification need to be addressed in a formal setting, I believe that he is to be commended for drawing attention to the difficulties that procedural uncertainty can pose for both courts and counsel. It seems to me that one possible way of providing guidance to all concerned is through the adoption of appropriate rules of court. Given the frequency with which such matters seem to be appearing in reported cases, it may be that the resolution of residual procedural uncertainty in this area is a law reform project whose time has come.

\section*{X. Conclusion}

It has been 150 years since the Dimes case was decided by the House of Lords. Judicial impartiality remains, as it was then, the cornerstone of our legal system. If the significance of judicial impartiality has remained unaltered during this time, the ways in which Commonwealth courts have been thinking about impartiality have not. I trust that this essay will be able to make at least a small contribution to the development of the understanding Canadian lawyers and judges have of this subject.

\textsuperscript{151} Ibid. at para. 27.