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Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification

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Despite a considerable amount of litigation concerning judicial impartiality, the Canadian "reasonable apprehension of bias" test for judicial disqualification has remained fundamentally unaltered and is well accepted in the jurisprudence. Unfortunately, the application of the test continues to generate difficulties for judges who need to use it to make decisions in marginal cases. Based on previously published doctrinal and empirical research, the goal in the present contribution is to suggest modifications to the test that will better explain the existing jurisprudence and make it easier for judges to understand when recusal is or is not necessary in marginal cases. The authors consider first the advantages of the existing test and suggest that in order to be useful, any refinement to the test must, to the greatest extent possible, preserve those advantages. Second, the authors explain why inconsistent application of the test in marginal cases is a concern. Third, they analyze the ways in which the existing test, and the jurisprudence explaining and applying it, are problematic. Fourth, the authors propose a modification to the "reasonable apprehension of bias" test that is designed to address these shortcomings while preserving the key advantages of the existing test.

Malgré les nombreux litiges concernant l'impartialité du pouvoir judiciaire, le critère canadien de la crainte raisonnable de partialité pour déterminer l'incapacité en matière judiciaire est resté fondamentalement intact et accepté dans la jurisprudence. Malheureusement, l'application du critère continue à présenter des difficultés pour les juges qui doivent l'utiliser pour prendre des décisions dans des cas marginaux. Cet article, qui s'appuie sur la recherche dans la jurisprudence et la recherche empirique, a pour objectif de suggérer des modifications au critère, modifications qui expliqueront mieux la jurisprudence existante et faciliteront la tâche aux juges qui doivent décider s'il y a lieu de se récuser dans des cas marginaux. Les auteurs examinent d'abord les avantages du critère actuel et avancent que pour être utile, toute précision qui y serait apportée doit, dans toute la mesure du possible, préserver ces avantages. Les auteurs expliquent ensuite pourquoi l'application non uniforme du critère dans les cas marginaux est préoccupante. Troisièmement, ils analysent les motifs qui font que le critère existant de même que la jurisprudence utilisée pour l'expliquer et l'appliquer sont problématiques. Quatrièmement, les auteurs proposent une modification au critère de crainte raisonnable de partialité conçue pour corriger ces lacunes tout en préservant les principaux avantages du critère existant.

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Introduction

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Introduction

The “reasonable apprehension of bias” test for judicial disqualification has been a fixture of Canadian law for many years, at a minimum since its formulation in the *National Energy Board* case in 1978.¹ By that time, the Supreme Court of Canada was able to draw on a long history of Canadian and other common law precedents in support of identically or similarly framed tests for determining judicial impartiality. Despite a considerable amount of litigation concerning judicial impartiality since that time, the test itself has remained fundamentally unaltered and is well accepted in the jurisprudence. Unfortunately, the application of the test continues to generate difficulties for judges who need to use it to make decisions in marginal cases.²

Our experience as facilitators in judicial education seminars over the years led us to believe that judges often have very different views about how the “reasonable apprehension of bias” test should be applied. In particular, we noticed that even when the case law indicated that it was not necessary for a judge to recuse himself or herself in a particular situation,

1. *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394 [*National Energy Board*]. It is worth noting that the *National Energy Board* case itself did not involve the disqualification of a judge but the disqualification of a member of an administrative tribunal. The *Nation Energy Board* test is, however, employed in the leading Supreme Court of Canada decisions involving challenges to the impartiality of judges. See, for example, *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 at para 60 [*Wewaykum*]; *R v RDS*, [1997] 3 SCR 484 at para 31, per L’Heureux-Dubé and McLachlin JJ; and para 111, per Cory J.

2. Lorne Sossin has observed that “[t]he law in Canada relating to judicial bias is at once clear and unsettled. It is clear because for purposes both of legal and ethical accountability, the standard of impartiality which has been adopted, that of reasonable apprehension of bias, has found widespread acceptance. It is unsettled because the application of that standard remains very much in flux”: “Judges, Bias and Recusal in Canada” in Hoong Phun Lee, ed, *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press, 2011) 301 at 321.

it was quite common for judges participating in seminars to suggest that the application of the general reasonable apprehension of bias test would lead them to a different conclusion. We hypothesized that these differences of opinion might not appear in the reported case law because in many instances judges recuse themselves of their own motion, with the result that the case law significantly under-reports the incidence of recusal. With the assistance of the Canadian Association of Provincial Court Judges, we sought to develop a better understanding of how judges think about recusal and disqualification by conducting a survey of 137 Canadian provincial and territorial judges concerning their experience of and attitudes toward recusal in analytically marginal cases.

The results of the survey, which were published in the *Alberta Law Review* in 2011, tended to confirm our suspicions.³ The judges we surveyed reported that it was reasonably common for them to recuse themselves: two-thirds of the respondents indicated that they would recuse themselves between one and five times in a typical year and a further nineteen per cent indicated that they would recuse themselves more often than this in a typical year.⁴ By far the most common practice was for the judge to recuse of his or her own motion, with the typical result that no written record was made of the judge's reasons for taking this decision.⁵ Moreover, we found a significant degree of variation in the judges' responses to the scenarios we posed,⁶ which suggested to us that even though judges are very familiar with the "reasonable apprehension of bias" test, it is not very helpful as a way of developing a common understanding of how marginal disqualification cases ought to be resolved. Our goal in the present paper is to suggest modifications to the test that will better explain the existing jurisprudence and make it easier for judges to understand when recusal is or is not necessary in marginal cases.

We begin by looking at the reasons, both doctrinal and practical, why the "reasonable apprehension of bias" test is so widely accepted. These reasons are compelling. To be useful, any refinement to the test must, to the greatest extent possible, preserve the considerable advantages of the existing test. In the second part of the paper we consider why inconsistent application of the test in marginal cases is a concern. This is followed by a more detailed consideration of the ways in which the existing test, and the

3. Philip Bryden & Julia Hughes, "The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification" (2011) 48 *Alta L. Rev.* 569 [Bryden & Hughes, "Tip of the Iceberg"].

4. *Ibid* at 576-577.

5. *Ibid* at 577.

6. *Ibid* at 579-582.

jurisprudence explaining and applying it, are problematic. The fourth part of the paper proposes a modification to the “reasonable apprehension of bias” test that is designed to address these shortcomings while preserving the key advantages of the existing test.

I. *Why do we have the test we currently use? Principled and practical advantages and disadvantages*

In departure from English law, Canadian and Australian courts use a unified “reasonable apprehension of bias” test to determine all cases of disqualification.⁷ Courts in England and New Zealand use a bifurcated test. In the English test, a distinction is drawn between situations in which disqualification is automatic and situations in which a reasonable apprehension of bias test is employed.⁸ However, the difference between the Canadian and English approaches is more one of methodology in the reasoning process than tests that produce fundamentally different results. Cases that result in automatic disqualification in England would normally also result in disqualification in Canada using the reasonable apprehension of bias test. The two approaches have grown closer together more recently, as over the past decade English courts have made it clear that the “apprehension of bias” branch of the test in England is a “reasonable” apprehension of bias, rather than a more relaxed standard for the assessment of judicial impartiality.⁹

The Canadian test focuses on the perceptions of a reasonable person rather than on the presence or absence of actual bias. There are several reasons, both principled and practical, for the approach Canadian law has taken to the question of whether or not a decision-maker is impartial. The principled reasons include related concerns over the legitimacy of outcomes, the credibility of the judicial process, and the desirability of voluntary compliance with judicial decisions. The practical concerns relate to difficulties of proof of actual bias.

7. See *Wewaykum*, *supra* note 1 at paras 69-73; *Ebner v Official Trustee in Bankruptcy*, (2000) 176 ALR 644 (Aust HC); *R v Webb* (1994), 122 ALR 41 (Aust HC). See also Philip Bryden, “Legal Principles Governing the Disqualification of Judges” (2003) 83 Can Bar Rev 556 at 558-563 [Bryden, “Legal Principles”]; Andrew Field, “Confirming the Parting of Ways: The Law of Bias and the Automatic Disqualification Rule in England and Australia” (2001) Singapore Journal of Legal Studies 388.

8. See *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No 2)*, [2000] 1 AC 119 (HL) [*Pinochet*]; *Porter v Magill*, [2002] AC 357 (HLE); *Muir v Commissioner of Inland Revenue*, [2007] NZCA 334, [2007] 3 NZLR 495; Michael Taggart, “Administrative Law” (2003) New Zealand Law Review 99 at 99-104.

9. See *Porter v Magill*, *supra* note 8; *Helow v Secretary of State for the Home Department*, [2008] UKHL 62, 2008 SCLR 830 (HL).

From the standpoint of principle, it is important to us that our systems of adjudication (whether administrative or judicial) have public credibility. This credibility starts with the litigants in question, but goes far beyond to include the citizenry in general. Judicial and other adjudicative processes that are not publicly credible not only undermine the acceptability of the immediate outcome of a case, but also operate to diminish the reputation of the justice system as a whole. A chief component of public credibility is not merely the actual but also the perceived impartiality of judges and adjudicators.

This concern with the repute of the justice system must include concerns over the process by which we decide on challenges to impartiality. If our rules for judicial disqualification were to focus on the actual impartiality of the decision-maker, the awkward process of attacking and then attempting to shore up the reputation of the decision-maker in proceedings where a party challenges the impartiality of the decision-maker is likely to damage the public perception of the legal system. This is true even if the challenge itself ultimately fails.

Additionally, the efficacy of our system of law is built very heavily on voluntary compliance with the decisions of courts and tribunals. 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.

Finally, it bears remembering that our system of adjudication is built on notions of public justice. Not infrequently, issues of partiality will be tied up with concerns over lack of transparency or accountability. Similarly, some of the chief guarantees of judicial impartiality are closely linked to the public nature of our justice system: judicial independence, constitutional guarantees, and public funding.¹⁰ It seems appropriate that a system of public justice should concern itself with objectively manifested impartiality, and not merely with the question of whether a particular decision-maker in fact kept an open mind.

From a practical perspective there are attractions to concentrating on a reasonable perception of bias rather than demanding proof of actual bias. 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,

10. See, for example, *R v Campbell*, [1997] 3 SCR 3 at para 10, in which Chief Justice Lamer referred to "public confidence in the impartiality of the judiciary" as something "essential to the effectiveness of the court system."

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. Equally, the ability of a person seeking to uphold a decision to show that the decision-maker was impartial is inhibited by the usual difficulties inherent in proving a negative (absence of bias). In addition, both a party seeking to challenge a decision on the basis of the judge's actual bias and a party seeking to uphold the decision in the face of such a challenge are inhibited by the restrictions the law places on the judge's capacity as a witness.¹¹ Thus, the "reasonable apprehension of bias" standard 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.

II. *Why should we care about variability in the application of the reasonable apprehension of bias test?*

A person who was skeptical about modifying the "reasonable apprehension of bias" test might well argue that there is nothing special about judges having differences of opinion in marginal cases. What makes a case marginal, after all, is our ability to make plausible arguments for or against a particular result. The use of a "reasonableness" standard implies a requirement that a range of considerations will come into play in different contexts, and over time the common law method has allowed judges using the "reasonableness" standard to develop a coherent jurisprudence in a variety of different areas of the law.¹² Why, the skeptic might ask, should the law with respect to judicial impartiality be any different?

We offer two responses to the skeptic's query. One is to observe that refinement of the tests judges use to make decisions is an important part of the common law method. If we are able to refine the reasonable apprehension of bias test in a manner that helps to explain the jurisprudence, and make it more coherent and easier for judges to apply consistently, even a skeptic ought to agree that the effort is worthwhile. We would argue that the level of disagreement among judges concerning the application of the test in marginal cases that we have identified suggests that there is considerable room for improvement. We acknowledge that we still need to demonstrate

11. See Geoffrey Lester, "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001) 24 Advocates Q 326 [Lester, "Disqualifying Judges"]. As Mr. Lester observes, judges can, and occasionally do, make statements about the facts that are relevant to a disqualification application, but they cannot give evidence and are not subject to cross-examination.

12. Familiar examples include the reasonable person standard of care in negligence law and the reasonable person standard in the law of self-defence in criminal law. See, for example, *Arland v Taylor*, [1955] OR 131 (CA); *R v Cinous*, [2002] 2 SCR 3; and *R v Lavallee*, [1990] 1 SCR 852.

to the skeptic that we have succeeded in our attempt to improve upon the “reasonable apprehension of bias” test.

The second response is that disagreements about whether judges should or should not recuse themselves have a meaningful impact on the administration of justice, and any improvement we can offer in this area will benefit both the judges and the members of the public who use our court system. The point of departure for this argument is that recusal is sufficiently frequent to have an impact on the effective and efficient administration of justice. As we noted above, in “Tip of the Iceberg,” two-thirds of our respondents indicated that they would recuse themselves between one and five times in a typical year. Another nineteen per cent reported recusing more than five times a year. Only fourteen per cent indicated that they would not recuse themselves at all in a typical year.¹³

The reported case law on recusal, while extensive, does not begin to reflect the actual scope of recusal as the vast majority of recusal decisions are made by judges on their own motion. This was true for the respondents to our survey,¹⁴ and judging from comments of participants at judicial education seminars, it is true for judges at all levels of Canadian courts. It is difficult to estimate the global impact of recusal on the administration of justice as the degree of disruption to the work schedule of the court will vary depending on the stage in the proceedings at which recusal takes place, the context in which the judge works, and the particularities of the case. The same factors will influence the extent to which recusal has an impact on the parties. In most instances a decision not to sit taken prior to the docket being finalized has a very different impact on the parties than a decision to recuse half-way through a trial. The practical consequences for the parties of the recusal of the sole judge in a small town or a judge on circuit are likely to be different than the impact of recusal by a judge in a major centre. The inherent delay that attends many recusal decisions may affect one party more than the other. Similarly, delay in some types of proceedings may have more serious consequences for the parties than in other situations.

Our research also suggests that judges recuse in some marginal situations where jurisprudence and/or policy would suggest that they should not recuse.¹⁵ This may be because judges are apprehensive about appellate treatment or because they do not wish to sit when a party has

13. Bryden & Hughes, “Tip of the Iceberg,” *supra* note 3 at 576-577.

14. *Ibid* at 572.

15. *Ibid* at 584-585 and 604-608.

expressed a lack of confidence in their impartiality.¹⁶ Our research further indicates that certain types of situations are subject to a great deal of uncertainty and disagreement between judges.¹⁷ Greater clarity would likely promote efficiency by avoiding unnecessary recusals. It would also enhance the transparency of judicial practice with respect to recusal and would encourage consistency.

III. *Problems with the existing test*

The chief problem with the reasonable apprehension of bias test is that it does not provide an adequate acknowledgement that courts balance considerations of the effective administration of justice against a party's perception that the judge's impartiality is compromised by his or her relationship with one of the participants in the litigation.¹⁸ We argue that the results of the jurisprudence are best explained by recognizing that balancing of these considerations actually takes place, but the reasoning in the cases in which we observe the phenomenon is rarely explicit in taking the effective administration of justice into account. Our assumption is that judges are reluctant to refer explicitly to the desirability of balancing considerations of the effective administration of justice for two reasons. The first is that the "reasonable apprehension of bias" test has such a long pedigree that judges are reluctant to modify it, and as it is presently constructed there is no reference to balancing considerations.¹⁹ The second is that the balancing of considerations of the effective administration of

16. There is a significant strand of American thinking on judicial disqualification that favours peremptory challenges where a party subjectively believes that a judge will not be impartial. See Charles Geyh, "Draft Report of the ABA Judicial Disqualification Project" (2008), online: <http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/jdp_geyh_report_authcheckdam.pdf> at 60-65; James Sample & Michael Young, "Invigorating Judicial Disqualification: Ten Potential Reforms" (2008) 92 *Judicature* 26 at 27-28; Debra Lyn Bassett, "Judicial Disqualification in the Federal Appellate Courts" (2002) 87 *Iowa Law Review* 1213 at 1224 and 1251-1256; Richard Flamm, *Judicial Disqualification: Recusals and Disqualification of Judges*, 2d ed (Berkeley, CA: Banks and Jordan Law, 2007) at § 26.1.

17. Bryden & Hughes, "Tip of the Iceberg," *supra* note 3 at 579-582.

18. The most common situations in which these concerns arise is where the judge has a social relationship with a party or counsel or, less frequently, with a witness, or where the judge has had previous interactions with one or more of the parties in a judicial setting, what we like to refer to as the "repeat customer" phenomenon.

19. The current test is taken from the reasoning of Justice DeGrandpré, dissenting, in the *National Energy Board* case, *supra* note 1. As endorsed by the Supreme Court of Canada in *Wewaykum*, *supra* note 1 at para 60, it is:

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

justice in disqualification cases tends to highlight the practical limitations of our court system to actually deliver the type of justice that litigants might prefer to receive.²⁰

Courts commonly employ two devices to justify the rejection of arguments that a judge should be disqualified using an objective standard of reasonableness. The first is an emphasis on the fact-specific nature of the application of the test, and the second is an attribution of certain insider knowledge or characteristics to the “reasonable person.” Neither approach, in our respectful view, is entirely satisfactory.

As an example of the first device, in its 2003 decision in *Wewaykum Indian Band v Canada*, the Supreme Court of Canada observed that the application of the reasonable apprehension of bias test is “highly fact specific.” In the Court’s words:

Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.²¹

The idea that judges should pay attention to the entire context in deciding whether or not recusal or disqualification is warranted is not inherently problematic, but it offers little or no guidance to judges in deciding what weight to give the relevant considerations or even what facts or contextual factors are relevant. This generates a broad area of discretion. Again, that would not necessarily be problematic, but there are reasons to believe that the exercise of the discretion will be influenced, sometimes strongly, by extraneous considerations that would favour recusal, in situations where the jurisprudence and a principled consideration of the merits would favour the opposite conclusion.

In our experience, judges perceive the consequences of making what is subsequently determined to be an incorrect decision to hear a case as much more serious than the consequences of recusal in a situation where this is not strictly speaking necessary. Judges rightly believe that impartiality, and the reputation for impartiality, are core characteristics of judicial office as

20. Courts are much less reluctant to recognize the inherent limitations on impartiality that flow from the adjudicative systems legislatures have chosen when discussing impartiality in the administrative justice context. See, for example, *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623; *Save Richmond Farmland Society v Richmond (Township)*, [1990] 3 SCR 1213.

21. *Wewaykum*, *supra* note 1 at para 77.

well as constitutional imperatives.²² In the absence of a strong consensus surrounding when recusal is warranted in marginal situations, there are strong incentives for judges to be risk averse when they find themselves faced with such situations.²³

The device of imputing insider knowledge to the reasonable person has become a relatively common means for courts to justify their conclusion that recusal or disqualification is not warranted in a particular context. In many instances, however, it cannot help but appear that the sensibilities of the judge making the determination play a very significant role, at least in marginal cases. This has two unfortunate consequences. The first is that because judges are required in the first instance to rule on challenges to their impartiality, a party who has unsuccessfully challenged the judge's impartiality is forced to accept what appears to be the highly subjective assessment of a judge whose impartiality, at least in the eyes of that party, is already suspect.²⁴ One of the virtues of the "reasonable apprehension of bias test" is that it is designed to focus attention away from a subjective assessment of the judge's impartiality and towards an objective assessment of the judge's impartiality. If the legal construction of the reasonable observer is perceived to be highly subjective much of the value of the test is compromised—if not lost entirely.²⁵

The other unfortunate consequence is that a party who makes an unsuccessful challenge to a judge's impartiality is implicitly portrayed as

22. The Canadian Judicial Council's guide to judges on ethical behavior, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) states at 30 that "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary," an observation endorsed by the Supreme Court of Canada in *Wewaykum*, *supra* note 1 at para 59.

23. A number of American commentators suggest that judges in that country are overly reluctant to disqualify themselves using the "apparent bias" test for disqualification because they believe that willingness to accede to disqualification applications would undermine public confidence in the administration of justice. See, for example, the ABA Judicial Disqualification Project, "Taking Disqualification Seriously" (2008) 92 *Judicature* 12 at 16-17; John Leubsdorf, "Theories of Judging and Judicial Disqualification" (1987) 62 *NYUL Rev* 237 at 245-252.

24. Charles Geyh, author of the Report of the ABA Judicial Disqualification Project, *supra* note 15 at 65-68, identifies the current practice that judges adjudicate disqualification motions themselves as one that raises serious problems and the Report encourages states to adopt rules assigning contested disqualification motions to a different judge. See also Sample & Young, *supra* note 16 at 30-32; Leslie Abramson, "Deciding Recusal Motions: Who Judges the Judges?" (1994) 28 *Valparaiso UL Rev* 543 at 559-560; Hon Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Oxford: Hart Publishing, 2009) at 82-84; Hon Anthony Mason, "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Cons L & Pol Rev* 21 at 25-26.

25. As law teachers we have often noticed the level of discomfort our students experience in discussing cases such as *National Energy Board* and *R v RDS*, *supra* note 1, in which members of the Supreme Court of Canada disagree on the application of the "reasonable application of bias" test to the facts of the case before them. We suspect that in these instances our students are reflecting a preference as citizens for an ideal of justice in which the meaning of core concepts such as judicial impartiality is universally understood and accepted.

unreasonable. The same unfortunate consequence befalls a judge whose decision that the law did not disqualify him or her from sitting is set aside on appeal. No doubt there will be situations in which this is in fact the case, but as our research has suggested, there are many marginal cases in which reasonable judges will disagree about whether recusal or disqualification is warranted. As a matter of law, we have to draw boundaries between marginal situations in which judges are disqualified and ones in which they are able to adjudicate. In our view, it does not serve the interests of justice to rub salt into the wounds of either a litigant whose sincere, albeit unsuccessful, challenge to the impartiality of a judge must be rejected, or the judge whose possibly reasonable but incorrect conclusion must be set aside on appeal.²⁶

Reliance on the assumed insider knowledge or characteristics of the “reasonable person” as a way of distinguishing successful from unsuccessful challenges to a judge’s impartiality fails to articulate a number of factors that, based on our research, tend to influence recusal decisions in marginal cases. For example, judicial decisions concerning recusal and disqualification rarely identify concern over the impact of recusal on the parties or the administration of justice as an explicit basis for concluding that disqualification is inappropriate. Despite this, we would argue that the judges’ conception of judicial impartiality and their beliefs about the best way to reconcile this ideal with the competing practical realities of effectively administering a system of justice are likely frequent determinants in recusal decisions. Yet these competing factors, or even the idea that these factors might be in competition with impartiality concerns, are not flagged in the test and are, consequently, almost never expressed in recusal or disqualification decisions.

There are exceptions. It is possible to find some decisions in which judges have explicitly acknowledged the practical consequences for the administration of justice of accepting a party’s submission that it would be better if the matter were heard by a different judge. In *Newfoundland*

26. Appellate courts typically do not defer to first instance judges either in respect of their assessment of the relevant legal principles governing judicial disqualification or in the application of those principles to the facts before them. See *(DM) v M(TB)*, 2011 YKCA 8 at para 40; *Barrett v Glynn*, 2001 NFCA 70 at paras 63-65. Thus, appellate courts are not concluding that a judge’s incorrect decision to sit in a situation in which the “reasonable apprehension of bias” test has been met is “unreasonable” in the sense in which that term is used in administrative law. See *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at paras 44-50. Nevertheless, the fact that the test itself invites an assessment of the judge’s perceived impartiality from the perspective of “reasonable and right minded persons” (see the relevant passage from *National Energy Board* quoted above at note 18) has the unfortunate rhetorical effect of suggesting that persons who make assessments that prove to be incorrect are not being reasonable.

and *Labrador (Director of Child, Youth and Family Services) v Thorne*,²⁷ for example, Judge Porter dealt with an application that he should recuse himself made by the father of the children affected by a child protection matter. The basis for the application was that there was a reasonable apprehension of bias because Judge Porter had heard two bail hearings and sentencing submissions in relation to two criminal offences to which the applicant had plead guilty. One involved a threat to kill the applicant's former spouse. In the course of his reasons for denying the application, Judge Porter observed: "as a practical matter, if a Judge presiding in a rural judicial district might be disqualified from hearing more than one or two matters relating to any one individual, then she or he would soon find her or him self unable to hear anything."²⁸ Judge Porter also took into account the issues of delay and inconvenience to the mother of the children, who objected to the application,²⁹ and the possibility that the application was motivated by tactical considerations.³⁰

Regrettably, the type of candid assessment offered by Judge Porter of the role that considerations of the effective administration of justice played on his decision not to recuse himself in the *Thorne* case are extremely rare. It is more common for judges to introduce these considerations indirectly through the mechanism of imbuing the reasonable person with internal knowledge of the workings of the courts. A somewhat extreme example of an insider perspective attributed to the reasonable person emerges in *Wewaykum*.³¹ In justifying why the judgment should not be vacated, the Supreme Court relied on a distinction, ostensibly understood by the reasonable person, between lawyers in private practice and lawyers engaged in government or legal aid work.³² Even more surprisingly, this reasonable person is also aware of the inner workings of the deliberations of the Court prior to releasing judgments.³³ This insider perspective allows for consideration of important countervailing concerns such as efficiency and, in *Wewaykum*, the value of procedural certainty following a judgment. It undermines the integrity of the test, however, which is

27. [2007] NJ No 414 (QL) 2007, CanLII 52943 (NL PC) [*Thorne*].

28. *Ibid* at para 5.

29. *Ibid* at paras 4 and 6.

30. *Ibid* at paras 14-17.

31. *Wewaykum*, *supra* note 1.

32. On the latter point, see Adam Dodek, "Constitutional Legitimacy and Responsibility: Confronting Allegations of Bias After *Wewaykum Indian Band v. Canada*" (2004) 25 SCLR (2d) 165 at 174. For other examples of reliance on an "insider" perspective of the operation of the legal system in judicial disqualification cases, see *Taylor v Lawrence*, [2003] 3 WLR 640 (Eng CA) at paras 61-63; *President of the Republic of South Africa v South African Rugby Football Union*, [1999] 4 SA147 (SA Const Ct) at para 84.

33. *Wewaykum*, *supra* note 1 at para 92.

supposed to focus on the reputational interest of the justice system—an interest that must be seen from an outsider’s point of view. A number of judges in England and New Zealand have expressed concern that courts should not attribute knowledge to the “reasonable observer” that would not be shared by members of the general public. In the words of Justice McGrath in *Saxmere (No 1)*: “attributing knowledge of information to the hypothetical observer may transform the process from one of ascertaining the perception of a member of the general public, so that it becomes that of an insider in the legal world.”³⁴

Sensitivity to these competing concerns appears to be related to the perceived frequency of the scenarios that give rise to the possibility of recusal.³⁵ The strict stance courts across the common law world take regarding financial interests appears to be more rooted in the relative rarity of direct financial interests of judges in the success of litigants than in a deep concern over partiality.³⁶ Our research similarly suggests that judges in rural areas are substantially less likely to recuse than judges sitting in large urban centres where the bias issue relates to professional relationships.³⁷ The relative size of the professional community (and thus, the increased frequency of the problem) combined with the difficulty of finding a replacement for a judge who has recused (causing a higher impact on the efficient administration of justice) leads to the competing, but hidden, factors significantly affecting the decision to recuse.

A final doctrinal difficulty with the existing test relates to exceptions. There are two known mechanisms for overcoming a bias objection after

34. *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd (No 1)* (*Saxmere No 1*), [2009] NZSC 72, [2010] 1 NZLR 35 at para 97.

35. In an article entitled “Safeguarding Judicial Impartiality” (2002) 22 *Legal Studies* 53 at 62, Kate Malleson suggests that the guidelines laid out by the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd*, [2000] 1 All ER 65 (Eng CA) “are an essentially pragmatic attempt to protect the efficient operation of the court system over a purist application of the Hewart principle of justice [referring to Lord Hewart’s observation that ‘justice...should manifestly and undoubtedly be seen to be done’]. The fact that the construction of the categories has very little theoretical or empirical grounding is therefore not accidental nor the result of an inexplicable intellectual failure on the part of three of the most capable judges in the country. The construction of this list should be seen as a statement of policy rather than fact. In excluding background and personal origins, the court was seeking to limit to a bare minimum the damage that would arise to the running of the courts and the confidence in their fairness from frequent challenges. The gaps and inconsistencies of the *Locabail* guidelines suggest that they should be read as a signal to close the floodgates rather than an attempt to provide an internally or externally consistent framework for identifying the circumstances in which bias might arise.”

36. See Bryden, “Legal Principles,” *supra* note 7 at 574-579.

37. See Bryden & Hughes, “Tip of the Iceberg,” *supra* note 3 at 597-599.

a reasonable apprehension of bias has been found: waiver and necessity.³⁸ Both pose certain problems. Waiver sits somewhat uneasily with the objective focus of the reasonable apprehension of bias test because it seems to permit litigants to prefer their own view of whether a judge should be able to hear a case over that of the reasonable person. Equally, and assuming no recourse to notions of adjudicative efficiency, where a party seeks to deal with a bias problem on appeal, it seems difficult to justify why a litigant should have to live with their first instance decision not to raise a bias issue. This is particularly problematic given that the litigant may well think that raising the issue in a marginal case will further jeopardize their rapport with the judge.³⁹ It is from the perspective of the appearance of justice that the New Brunswick Court of Appeal rejected the application of the waiver doctrine in a case of political interference and cautioned that:

courts must approach the waiver issue with caution when dealing with allegations of bias. The categories of bias are diverse and each category should be looked at individually with a view to ensuring that the public confidence in the integrity of the tribunal decision-making process is preserved.

As the policy justification for the rule against biased decision-making is the public's loss of confidence in the administration of justice, this policy justification outweighs a party's right to expect legal issues to be raised in a timely manner. In my view, this is a proper case for the court to exercise its residual discretion to deal with the merits of the bias allegation, notwithstanding the application of the waiver doctrine.⁴⁰

Further, waiver may reintroduce an actual bias branch of the test through the back door. It has been suggested, for example, that actual bias renders the proceedings void *ab initio* and cannot be waived, while a reasonable apprehension of bias can be waived.⁴¹

38. For an example of the application of the waiver doctrine in the face of a finding of reasonable apprehension of bias, see *Fletcher v Canada (Minister of Citizenship and Immigration)* 2008 FC 909, [2008] 74 Imm LR (3d) 78. For an academic treatment of this issue, see David Mullan & Martha Boyle, "Raising and Dealing with Issues of Bias and Disclosure" (2004) 18 Can J Admin L & Prac 37 at 40-48. For necessity see, *The Judges v Attorney General of Saskatchewan*, [1936] 4 DLR 134 (Sask CA), aff'd [1937] 2 DLR 209 (JCPC); and *R v Campbell*, [1998] 1 SCR 3 at paras 4-8.

39. See the discussion of the procedural issues arising from the waiver doctrine in "Legal Principles," *supra* note 7, at 589-91; Geoffrey Lester, "Disqualifying Judges," *supra* note 11 at 337.

40. *Fundy Linen Service Inc v Workplace Health, Safety and Compensation Commission*, 2009 NBCA 13, 308 DLR (4th) 53 at paras 19 and 21.

41. See the suggestion made by counsel to the court in *Zündel v Canadian Human Rights Commission*, [1999] 3 FC 58 at para 16. Reed J did not find it necessary to rule on the question because she concluded: "There is no evidence before me that demonstrates the existence of any actual bias."

Similarly, the doctrine of necessity is not well integrated into the overall doctrinal scheme of judicial disqualification.⁴² If our sole concern is whether a reasonable apprehension of bias exists, it is not clear how a taint affecting all members of a court would make the reasonable person more rather than less accepting of a judgment so tainted. As the Supreme Court of Canada observed in *R v Campbell*: “The law recognizes that in some situations a judge who is not impartial and independent is preferable to no judge at all.”⁴³ In our view, the justification for the necessity doctrine is not that it is impossible to imagine a way in which our system of justice could be modified to find an adjudicator who does not have a material interest in the dispute. Rather, the explanation is that we do not consider it appropriate to require the justice system to allocate adjudicative authority to another body in the relatively rare instances in which all judges have the same type of financial interest in the outcome of the dispute.

Some of the difficulties that judges encounter in the application of the reasonable apprehension of bias test go beyond the framing of the test. In our research, we found that provincial and territorial court judges showed significant variability in their application of the test depending on the context in which the test was being applied.⁴⁴ Also, some judges appeared to favour not sitting when a party objected, while others emphasized their duty to sit barring a legal requirement to recuse.⁴⁵ Again, it became apparent that factors that were not part of the formulation of the test played an important role. That said, no single factor allowed us to predict how a judge would approach any given situation.⁴⁶ What became evident is that recusal is a complex phenomenon and there is no simple explanation for the variation.

In our study, we identified five considerations that seemed to us to be likely candidates to have at least some influence on the different responses or otherwise explain the information we received through the survey. The first was the different assessments judges made of the practical implications for the efficient administration of justice of their willingness to recuse themselves in different types of situations. The second was the extent to which judges perceived that parties were raising recusal in order to gain a tactical advantage rather than as the result of a genuine concern about the presence of a reasonable apprehension of bias. The third was the

42. For a useful discussion of the necessity doctrine, see Richard Tracey, “Disqualified Adjudicators: The Doctrine of Necessity in Public Law” (1982) Public Law 628.

43. *Campbell*, *supra* note 38 at para 4.

44. See Bryden & Hughes, “Tip of the Iceberg,” *supra* note 3 at 583-595.

45. *Ibid* at 604-608.

46. *Ibid* at 596.

extent to which judges were influenced by a sense that they should be more willing to recuse themselves where the outcome of the dispute is of greater significance to the parties than they should in situations where the stakes are lower. The fourth was the extent to which judges were, or were not, aware of the common practice of their colleagues. And the fifth, as noted above,⁴⁷ was that some judges tended to avoid situations in which a party would prefer to have the matter adjudicated by a different judge, at least where there was no compelling reason not to do so. Other judges tended to emphasize their obligation to sit except where the law clearly requires that they do not do so. These factors had varying strength depending on the scenario to which the test was being applied.⁴⁸

The first three factors are connected to the test in that they also relate to the efficiency and good reputation of the justice system. Bias is not the only possible taint to a justice system. Delay, permitting parties to game the system, and disproportionate process all have the potential to affect the reputation of the courts and the justice system as a whole. The fourth factor relates to the efficiency and good reputation of the justice system in a slightly different way. Because most recusal decisions are made on the judge's own initiative and without notice, consultation, or reasons, it is not surprising that judges are less aware of their colleagues' practice in this area of the law compared to areas that consistently generate jurisprudence. This issue cannot be addressed effectively in the formulation of the test, but, as will be discussed below, may be susceptible to improvement through the articulation of bright line rules in the context of judicial ethics codes and through judicial education. The fifth factor, varying degrees of sensitivity to the perceptions of the parties, may not be resolved conclusively by the modification of the test we propose below, but at least this modification has the potential to make this factor more transparent and open to debate.

IV. *An adjusted version of the reasonable apprehension of bias test*

As we have seen, while there are considerable advantages in the way the reasonable apprehension of bias test is framed, a number of difficulties arise that might warrant some refinement of the test. Rather than determining only whether a reasonable apprehension of bias exists, we would argue that the test should expressly address some of the hidden factors that already inform recusal practice. In our view, understanding judicial disqualification as requiring a balancing of the various factors that would likely affect the reputation of the justice system such as bias and

47. See text at *supra* note 45.

48. Bryden & Hughes, "Tip of the Iceberg," *supra* note 3 at 597-608.

efficiency considerations, would bring greater clarity to the test and would promote more consistent application without sacrificing the advantages of the unified test. We therefore propose the following italicized text be added to Mr. Justice de Grandpré's classic formulation of the reasonable apprehension of bias test:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. *...In determining whether or not an apprehension of bias is reasonable, a court should balance the objective circumstances giving rise to the apprehension of bias with explicit consideration of the effect of the recusal decision on the reputation of the justice system and its effective and efficient administration.*

Under this test, factors favouring recusal would include that the apprehension of bias arises in the context of litigation with a high impact on the party/parties (e.g., criminal cases, civil disputes that have very high human stakes, such as child apprehension and custody litigation); the fact that there would be no or only minimal delay occasioned by the recusal; that the recusal does not result in a tactical advantage; or, more generally, that a recusal would have a low impact on the efficient administration of justice. Conversely, factors that would suggest a duty to sit would include long delays resulting from the recusal, the fact that recusal would clearly favour one side to the dispute, a perception of tactical use of a recusal motion, a high impact on efficient administration of justice, or a comparatively low stakes case.

There are, of course, situations where the bias concerns would inevitably overwhelm other considerations. These would at a minimum include situations where the judge is subjectively unsure of his or her ability to be impartial. As well, where binding precedent requires the recusal of a judge, the refined test would still require recusal.

Bringing an express multi-factor balancing test to analytically marginal cases has several advantages:

1. By requiring articulation, the relative strength of the (currently) hidden factors as compared to the bias concern would become overt, rationalized, and less impressionistic. Hidden reasoning creates inconsistency and uncertainty. Hidden reasoning related to the efficient administration of justice in instances of hidden cases of recusals *proprio motu* would likely exaggerate this effect.
2. The insider concerns of the justice system would no longer have to be artificially attributed to the reasonable person. This has a number of advantages. First, the reasonable person of the bias test would

more strongly resemble reasonable person tests in other parts of the law. This reasonable person could keep their focus firmly on the reputational impact of the bias concern. Second, it would allow judges who thought they should sit because recusal would implicate one or more of the factors militating in favour of a duty to sit to articulate this as part of their reasons. Third, appellate treatment of a refusal to recuse for reasons on the other side of the scales would no longer result in an implication that a judge was “unreasonable” merely because they felt that they had a duty to sit. Instead, an appeal court that wanted to disagree could simply state that it preferred the balance to be struck differently—a much more palatable and appropriate outcome.

3. The proposed test would rationalize the current categorical approach. As we noted above,⁴⁹ the current test is applied with varying strictness depending on the category or nature of the alleged bias. The test is applied very strictly in cases involving a direct financial interest, even where the amounts are quite small. It is applied much more leniently in cases where the alleged bias relates to a prior professional relationship or where extra-judicial statements might be taken as disclosing an opinion or a preference. Bias cases involving social rather than professional relationships tend to fall somewhere in the middle.⁵⁰ Rather than applying the test strictly in low-frequency cases (e.g., direct financial interest) and leniently in high-frequency cases (e.g., statements tending to disclose views), the test itself would reflect these factors. This is because balancing the bias concern against the efficient administration would reflect the frequency difference. This, it might be hoped, would lead to a more integrated jurisprudence.
4. The exceptions fit better into the doctrinal framework. Informed waiver is indicative of a (reasonable) perception by the parties that proceeding with the assigned adjudicator is consistent with the effective, efficient, and respectable administration of justice. The waiving party would not be sending a signal that they don’t care about impartial adjudication; rather, the waiver would suggest that the, now express, competing considerations simply outweigh the potential bias concern. In a similar vein, the doctrine of necessity would no longer be an unconnected exception. Instead, it would represent the end of a spectrum, where for practical administration of justice reasons, no effect can be given to the bias concern.

49. See the text at notes 34-35 above.

50. See Bryden, “Legal Principles,” *supra* note 7 at 580-583.

5. The modified test makes it easier to explain the extensive line of authority that indicates that the experiences judges bring to judicial office cannot normally be used as a basis for a challenge that the judge for lacks impartiality.⁵¹ The rationale for these decisions is not that it is unreasonable for litigants or members of the public to believe that a judge's life experience will influence his or her outlook on a case. Rather, the rationale is that it is inevitable that a system of justice that relies on appointed judges as opposed to judges who are selected by the parties will occasionally bring forward judges whose life experience and initial perspective on a case is likely to be more favourable to one party than to another. This is a reason for the judge to be particularly assiduous in ensuring that he or she is weighing the evidence and arguments as impartially as possible, but in our view it would not enhance the reputation of our justice system if the law made this type of consideration a basis for judicial disqualification.

In sum, rendering visible the hidden factors that currently influence recusal practice in the shadows of the reasonable apprehension of bias test would lead to greater doctrinal coherence and to more certainty of application.

V. *Assisting with the application of the test*

In addition to our suggestion regarding the substantive test itself, we believe it is useful to make a few observations about both the standard of review to be used in assessing first instance decisions and a number of procedural changes that could facilitate first instance decision-making. On balance, we are of the view that the choice of the appropriate balance among competing interests militating in favour of sitting as opposed to disqualification should be understood as a question of law that would be reviewed using a "correctness" standard rather than a question of mixed fact and law or an exercise of discretion that would be reviewed using a more deferential "reasonableness" standard. This view is favoured by precedent, policy, and principle. In addition to running contrary to the widely (albeit not universally) held assumption that constitutional and procedural fairness issues should be reviewed using the correctness standard,⁵² the disadvantage of reasonableness review is that appellate judges will always want to interfere with some decisions and when they do, the specter of the

51. See, for example, *R v RDS*, *supra* note 1; *Arsenault-Cameron v Prince Edward Island*, [1995] 3 SCR 851, and the cases discussed in Bryden, "Legal Principles," *supra* note 7 at 587-589.

52. See David Jones & Anne de Villars, *Principles of Administrative Law*, 5th ed (Toronto: Carswell, 2009) at 572-576; Donald Brown & Hon John Evans, *Judicial Review of Administrative Action* (Toronto: Canvasback Publishing, 2012) at §7:1610 and §14:4211.

“unreasonable” first instance decision-maker once again looms its ugly head. Further, a correctness standard is consistent with the view that, since judicial impartiality is both a constitutional imperative and a requirement of procedural fairness, both litigants and members of the judiciary would benefit from authoritative appellate guidance rather than general appellate supervision with respect to the striking of this balance. That said, we acknowledge that the advantage of reasonableness review would be that it recognizes that striking an appropriate balance is a nuanced and fact-sensitive task and that trial judges (or administrative tribunals) may benefit from having some leeway in their margin of appreciation of the relevant considerations. In theory, it could also lead to trial judges and tribunal members having more confidence in their ability to sit in marginal cases, which may be a good thing for the justice system overall. We are ultimately not persuaded, however, that these pragmatic considerations outweigh the advantages we have identified for using the correctness standard.

With respect to questions of procedure, our study revealed that judges currently under-utilize some of the already available mechanisms for improving recusal decisions. As indicated, most judges recuse of their own motion without consulting either the parties or other judges. Consulting the parties can be tricky. On a variety of occasions when we have discussed recusal and disqualification issues with judges we have found that a number of judges expressed the concern that advising the parties of facts that, in the judge’s mind, did not give rise to a reasonable apprehension of bias was simply asking for trouble. Conversely, where the facts were closer to the line, disclosure might be seen as fishing for a waiver. In our view, if the facts are sufficiently relevant to be on the judge’s mind, they probably warrant consultation of some kind, unless the facts are such that the judge has already decided that he or she will recuse. The reformulated test ought to assist judges in framing the disclosure more neutrally as both sides of the equation are now expressly part of the analysis.

Generally, more jurisprudence would be very desirable. The current reported case law is heavily tilted toward those situations where a party formally (and unsuccessfully) moves for recusal. As indicated, these cases are exceptional, both from a procedural and from a substantive viewpoint. This results in a jurisprudence that is not only unrepresentative of the overall picture, but also offers limited assistance to judges who have to

decide whether or not to sit in relatively common marginal situations.⁵³ If some more clear cases were reported and the scope of recusal were better understood, it would help both parties and judges appreciate how bias may manifest as well as the actual impacts of recusals on the administration of justice. Another tool that is under-utilized is pro-active rule making. There are few bright-line rules about recusal. In the area of professional relationships, an area that is particularly troubling to many judges, all jurisdictions should promulgate rules regarding cooling-off periods for both former firms and former clients (on unrelated matters). Other areas that would benefit from bright-line rules relate to prior proceedings, particularly related proceedings. It should be made clear that a judge who was involved in a bail hearing may (or may not) hear the trial. A judge who imposed conditions as part of a criminal sentence may (or even should) hear any breach proceeding. Another area suitable for bright-line rules is involvement in case management. These are matters of such frequency that neither litigants nor the bench should be in any doubt about acceptable practices.

Finally, it would also be desirable to include procedural rules for recusal motions in the various rules of court. In particular, we think that it would be useful to give a judge the explicit discretion to refer a recusal motion to another judge, as has been suggested by a number of Australian judges including former Chief Justice of the High Court of Australia, Sir Anthony Mason.⁵⁴ There will often be circumstances in which it is appropriate for a judge to make a decision with respect to recusal personally, either because the judge is concerned about his or her subjective capacity to act impartially in the circumstances of a particular case or more commonly because referring the matter to another judge would cause unjustifiable delay. On the other hand, we believe that there may be circumstances in which it would serve the interests of both the parties and the judge if the balancing of interests that we describe in our revised “reasonable

53. Once again, it is worth noting that some American commentators suggest that the recusal jurisprudence in that country is skewed by a tendency for the reported decisions to come disproportionately from judges who are seeking to justify their unwillingness to recuse, perhaps in situations in which they should not sit, see *supra* note 23. This is based on the observation that judges who are inclined to recuse are likely to do so on their own motion and without written reasons. Thus, the jurisprudence is dominated by those judges who are reluctant to recuse. Our research concerning Canadian judges suggests that there are outlying views at both ends of the spectrum of willingness to recuse. See Bryden & Hughes, “Tip of the Iceberg,” *supra* note 3 at 604-608. Our impression is that in Canada, the open-ended character of the “reasonable apprehension of bias” test and the paucity of jurisprudence providing authoritative guidance in relatively common marginal situations often encourages judges to be more willing to recuse themselves than would be advisable in the best interests of the effective administration of justice.

54. Mason, *supra* note 24.

apprehension of bias test” could be done by a different judge than the one who has been assigned to try the case.

Conclusion

The “reasonable apprehension of bias” test for judicial disqualification has been used in one form or another throughout the common law world for a very long time. Its success is derived from its substantial advantages in focusing our attention on the importance of maintaining public confidence in the impartiality of judges and on making an objective assessment of whether the circumstances would warrant a reasonable observer to lose confidence in the appearance that the judge was impartial. On the other hand, our research has indicated that the test does not offer determinative guidance to judges in marginal cases, and that some of the techniques used to assist judges in their efforts to take into account the impact of recusal in marginal cases on the effective administration of justice are less than helpful. As a result, we propose a refinement of the test that calls for explicit consideration and balancing of the reasons why recusal might be warranted with the impact of recusal on the effective, efficient and reputable administration of justice. It is our hope that this refinement will preserve the virtues of the basic test while enhancing the development of a jurisprudence that more effectively explains why recusal or disqualification is warranted in one marginal situation and not in another.