

In the Court of Appeal of Alberta

Citation: Boardwalk Reit LLP v. Edmonton (City), 2008 ABCA 176

Date: 20080515
Docket: 0603-0277-AC
Registry: Edmonton

Between:

Boardwalk Reit LLP

Appellant

- and -

The City of Edmonton and The Municipal Government Board

Respondents

**The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Clifton O'Brien**

**Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté on Disqualification**

**Reasons for Judgment Reserved of The Honourable
Mr. Justice O'Brien on Disqualification Concurring in the Result**

Application for Recusal

**Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté on Disqualification**

A. Introduction

1. Issue

[1] The issue is whether O'Brien J.A. and I should step down and decline to give judgment in an appeal where we have heard argument, and instead have the appeal reargued before a different panel.

2. Facts

[2] The appellant Boardwalk appealed its 2004 Edmonton land tax assessments to the Assessment Review Board. The respondent Edmonton assessor successfully moved to dismiss that appeal summarily because of correspondence which had been exchanged in late 2003. Boardwalk appealed to the Municipal Government Board, a three-member panel of which dismissed the appeal and affirmed the Assessment Review Board in September 2005. Boardwalk moved for judicial review in the Court of Queen's Bench, which heard it in April 2006, reserved decision, and denied judicial review in September 2006. Boardwalk appealed to the Court of Appeal in October 2006, and filed its factum in May 2007. The respondent assessor and the Municipal Government Board each filed a factum in June 2007. Oral argument was heard before a panel consisting of O'Brien J.A., myself and a third judge on November 29, 2007. The panel reserved judgment. On December 31, 2007, the panel asked counsel to submit further written argument on certain legal topics. Boardwalk's counsel did so on January 16, 2008.

[3] On January 31, 2008, the assessor's solicitors filed their part of that written legal argument. But they also wrote to the Chief Justice of Alberta asking to have the Court's entire panel step aside. The assessor suggested that an unrelated appeal by the third judge against that judge's Calgary house taxes would create an appearance of bias. The third judge then provided a letter setting out the relevant facts, which the Chief Justice passed on to counsel. I summarize the facts in Part B.2. The Edmonton assessor has now moved formally to disqualify all three members of the panel (filing an affidavit identifying a few relevant papers).

[4] The third judge has asked the Registrar to state that, without considering there to be any legal disqualification, that judge will voluntarily take no part in deciding this appeal on its merits. The Registrar's letter doing so explains on behalf of the third judge why there is no disqualification, in these words:

“The Supreme Court restated the test for recusal of a judge on the basis of reasonable apprehension of bias in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para 74: What would an informed person, viewing the matter realistically and practically - and having thought

the matter through - conclude? Would this person think it more likely than not that the judge, whether consciously or unconsciously, would not decide fairly? Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person.

The Court emphasized several fundamental principles, one of which is particularly relevant: an apprehension of bias must rest on serious grounds, in light of the strong presumption of judicial impartiality. This presumption carries considerable weight, and the law should not carelessly evoke the possibility of bias.

In [the third judge's] view, the circumstances of this case do not meet the stringent test for a reasonable apprehension of bias. The impugned relationship is too remote and there is no connection to the issues raised on this appeal. There is no legal basis for recusal.

[The third judge] is mindful of the admonition that judges ought not recuse themselves without good reason, as it is contrary to the public interest for them to do so. Nevertheless, this issue has become a significant distraction from the merits of the appeal, delaying its prompt disposition, which does not well serve the administration of justice.”

[5] The panel asked for written argument from the assessor and Boardwalk for and against the motion to disqualify the panel. They gave it, but the Municipal Government Board's counsel did not participate.

[6] The details are set out below in Parts B.2 and B.3.

3. Appropriate Procedure

[7] Little case law expressly discusses the appropriate procedures on a disqualification motion, although the practice seems uniform. The practice is for the impugned judge (or judges) to rule on the motion that he or she (or they) withdraw from hearing or deciding the case. See the cases cited in *Robertson v. Edm. Police Service (#10)*, 2004 ABQB 519, 362 A.R. 44 (paras. 118-20); *MacEwan v. Henderson*, 2003 NSCA 133, 219 N.S.R. (2d) 183.

[8] The method used here to give counsel the facts (a letter from the justice in question) is the one used by the Supreme Court of Canada in *Wewaykum I.B. (Roberts) v. R.*, 2003 SCC 45, [2003] 2 S.C.R. 259, 309 N.R. 201.

[9] Therefore, I will now decide whether or not I should continue to sit on this appeal and decide on its merits. These are my reasons about disqualification.

[10] There is no suggestion that either of us (O'Brien J.A. or I) has himself any legal reason not to hear this appeal. The assessor suggests instead that the third judge had a conflict of interest, and that that judge's presence has tainted the rest of the panel.

B. Was the Third Judge Legally Disqualified?

1. Introduction

[11] I cannot deal with the suggestion that the panel is disqualified, unless I examine the nature of the complaint about the third judge, to see its validity and extent. If that complaint holds no water, then it cannot affect us. If it does, I need to know its nature to see if it applies to us.

[12] Therefore, the first issue is whether the third judge was indeed legally disqualified. The fact that the third judge voluntarily steps down is no evidence that in law that judge had to.

[13] Of course, I am not trying to criticize (directly or indirectly) the decision of the third judge to withdraw voluntarily. For one thing, when there are still two other judges on the panel, a voluntary withdrawal has few if any adverse effects. Forcing a whole panel (or a sole judge) to step down after lengthy argument on the merits has very different consequences.

2. Retaining Same Advisers

[14] The third judge, who owns a house in Calgary, appealed its tax assessment, and used as an advocate an accountant named Hutchinson who worked for the firm Deloitte & Touche LLP. I will call that firm "Deloitte". For its Edmonton appeal to the Assessment Review Board and Municipal Government Board, Boardwalk had used other employees of Deloitte.

[15] No individual appeared or worked on both the Calgary appeal and Boardwalk's Edmonton litigation. So the complaint is that the person retained by the third judge for that Calgary appeal, worked for the same national firm of chartered accountants as did the people used by Boardwalk for its Edmonton appeal. I stress that in the courts, Boardwalk used a different firm entirely: a law firm. Deloitte did not appear (or testify) in either court.

[16] If a judge has a specialized problem, there may be few physicians, lawyers, or accountants qualified to advise on or treat the problem. A province of only a few million inhabitants at best can support a limited number of such specialists. Maybe only one. The situation in Prince Edward Island or one of the three territories must be far more difficult. And many judges are based in towns or cities of 100,000 or smaller. See *R. v. Werner*, 2005 NWTCA 5, 205 C.C.C. (3d) 556, 560. The Privy Council made that point about Auckland (a large city) in this context: see *Man O'War Stn. v. Auckland (City) (#1)* [2002] U.K.P.C. 28, [2002] 3 N.Z.L.R. 577, at p. 583. On the shortage of

specialized accounting firms, cf. *Griffiths McBurney v. Ernst & Young (YBM Magnex)*, 2001 ABCA 305, 293 A.R. 337 (para. 10). On banks, see *Ebner v. Official Trustee* [2000] H.C.A. 63, 205 C.L.R. 337, 176 A.L.R. 644, 75 A.L.J.R. 277 (para. 29).

[17] If knowing a witness professionally, or retaining the same accounting firm, disqualified a judge, then virtually every judge would either be denied proper professional advice, or would spend considerable downtime for want of work, and we would need a far larger Bench.

[18] Worse still, every judge would face many such alleged conflicts which he or she could not detect beforehand from the face of the pleadings or indictment. They would emerge only later, likely when one party became motivated to search for technical connections.

[19] All landowners, and some tenants, must pay land taxes to their local municipality. Most judges own a house or condominium. It is unseemly and impractical for a judge to argue personally before a tribunal, and so a judge who wishes to sue or appeal a personal matter must retain some advocate (maybe an accountant). Not all lawyers in Alberta are familiar with the law or procedure of municipal assessments, and many counsel who are familiar act for municipalities, not for taxpayers. There is now only a small handful of large accounting firms. A Canadian judge is not obliged to refrain from all personal litigation, nor to submit without complaint to all administrative action affecting him or her personally. Nor was the third judge.

3. Very Indirect Connection

[20] The assessor alleges as a conflict of interest or disqualifying fact that the third judge used an advocate (a chartered accountant) who worked for the same large national accounting firm as some other people who had been involved for Boardwalk at earlier stages. (On Deloitte's conduct, see subpart 4.)

[21] To be precise, the chain of connections relied on by the Edmonton assessor is as follows:

- Step 1: The third judge retained Mr. Hutchinson to argue that judge's Calgary house appeal.
- Step 2: Mr. Hutchinson works for Deloitte, a large national firm of chartered accountants.
- Step 3: Boardwalk hired Mr. Melhelm to deal with the Edmonton assessor over its Edmonton apartment buildings. He works for Deloitte.
- Step 4: Mr. Brazzell appeared for Boardwalk before the Assessment Review Board. He is a lawyer who works for Deloitte. Mr. Melhelm was a witness.

- Step 5: Mr. Brazzell, Mr. Goresht and Mr. Melhelm “appeared” for Boardwalk before three members of the Municipal Government Board, recites that panel. Since the first is a lawyer and the second two are accountants, presumably this use of the word “appeared” is not technical, but loose; Messrs. Goresht and Melhelm were witnesses there, and would not likely have been advocates too. (Mr. Goresht also works for Deloitte.)
- Step 6: Boardwalk’s lawyers Messrs. Macleod Dixon moved in the Court of Queen’s Bench for judicial review. No one from Deloitte appeared (or testified).
- Step 7: Boardwalk’s lawyers Messrs. Macleod Dixon appealed to the Court of Appeal; no one from Deloitte appeared.
- Step 8: The third judge was routinely assigned to sit in the Edmonton courtroom in which was later placed the appeal from the Court of Queen’s Bench Boardwalk decision.

[22] However one analyzes this or counts those steps, there are many degrees of separation between the third judge and the present Boardwalk appeal.

[23] The third judge did not hear argument by any advocate or firm of advocates who had ever acted for that judge. First, Messrs. Macleod Dixon argued for Boardwalk before the third judge, who has no connection with them. Second, the law firm appearing in the Court of Appeal (and Queen’s Bench) were not the advocates who appeared before the statutory tribunals. Third, different individuals were involved. The third judge has never met or dealt with any of the accountants or the lawyer from Deloitte involved in any of the Boardwalk proceedings. That judge has had brief dealings only with one person at Deloitte, Mr. Hutchinson. He was not involved in the Boardwalk case.

[24] Two different Municipal Government Board panels were involved in the two cases.

[25] The Edmonton assessor’s written argument alleges that “a reasonable person would conclude that [the third judge] . . . disagreed with the decision of the Municipal Government Board” in that judge’s case (Arg., para. 26). There is no evidence of that, nor evidence that that judge has tried to challenge the decision of the Municipal Government Board in the Calgary case by judicial review (or appeal of some kind). The third judge’s personal feelings about that judge’s house appeal are irrelevant. Any suggestion that a superior court judge would harbor ill will to one panel of a tribunal because of what a different panel had done on another topic contradicts the presumption of impartiality. And it is very far-fetched. The main part of the assessor’s argument disclaims any suggestion of actual bias, so how this part (para. 26) fits is not clear.

[26] In any event, what if a judge does know counsel appearing before him or her? That is no ground to disqualify that judge even if it happens (which it did not here). Here are some stronger examples where disqualification was held inappropriate:

- (a) One counsel is someone with whom the trial judge sometimes socializes, but he does not do so around the time of an actual case and did not around the time of this case, and never mentions his cases with that lawyer: **Wellesley L. Trophy Lodge v. BLD Silviculture**, 2006 BCCA 328, [2006] 10 W.W.R. 82.
- (b) The judge is a close neighbor and social friend of counsel's parents, and is the father of a classmate of counsel: **Banyay v. I.C.B.C. (Actton Petr. Sales)** (1995) 17 B.C.L.R. (3d) 216 (C.A.).
- (c) Even in a big city, where the judge's brother is a member of the large law firm appearing for one side; one cannot bar a judge from hearing any cases involving a large firm in his or her city: **G.W.L. Property v. W.R. Grace Ins. Co. of Canada** (1992) 74 B.C.L.R. (2d) 283, 288-89 (one J.A.).
- (d) One party's firm of lawyers also acts for the trial judge in drafting and holding the judge's will, even if the firm is revising the will about the same time as the trial: **Taylor v. Lawrence**, [2002] EWCA Civ. 90, [2003] Q.B. 528, [2002] 2 All E.R. 353.
- (e) Two lawyers are in a big firm. One (a partner) is retained to defend a suit against a small law firm. The plaintiff in that suit is the respondent in a probate proceeding (a separate suit) being tried by a judge married to the other lawyer (an employee) in the big firm: **Re Serdahaly Est. (Popke v. Bolt)**, 2005 ABQB 861, 392 A.R. 220.
- (f) Counsel for the accused is from the same law firm which had previously defended the son of the trial judge on a somewhat similar criminal charge: **R. v. Nicol**, 2006 BCCA 370, 211 C.C.C. (3d) 33.
- (g) A statutory tribunal retains a lawyer as its adviser who had previously advised it with respect to other matters with which one party before it had been involved (which had been overturned on appeal), irrespective of the lawyer's personal views: **Ayangma v. Human Rts. Comm.**, 2005 PESCAD 18, 248 N. & P.E.I.R. 79 (paras. 19-20).
- (h) The trial judge was divorced from a lawyer practising with one of the firms acting in the lawsuit in question, but no longer has any relationship with him:

Middelkamp v. Fraser Valley Real Est. Bd. [1993] B.C.J. #2965 (S.C. June 10) (paras. 7-8), affd. (1993) 83 B.C.L.R. (2d) 257, 20 C.P.C. (3d) 27 (C.A.).

- (i) The trial judge’s present spouse was represented in unrelated litigation by one of the big law firms acting on the present trial, and the trial judge was an inactive officer of the spouse’s management company (which was not a party): *Middelkamp v. Fraser Valley Real Est. Bd.*, *supra* (S.C.) (paras. 9-15).
- (j) The trial judge’s son is a lawyer employed in a firm of over 50 lawyers and is not a partner and was not involved on the file, but his firm acts for one side: *Makowsky v. Doe*, 2007 BCSC 1231, [2007] B.C.J. #1809 (paras. 4, 5, 9, 20, 29, 35), affd. and adopted 2008 BCCA 112, [2008] B.C.A.C. Uned. 22, [2008] B.C.J. #576 (March 7).

[27] The courts should encourage, not discourage, professional and semi-professional contacts between judges and counsel: *Taylor v. Lawrence*, *supra*, at 548 (Q.B.). Even in a large city, a former lawyer cannot have practised law long enough to become a judge without knowing most of the active barristers. In a smaller town, a judge would know almost every professional person.

[28] A judge is not disqualified because of “a partiality or a preference or even a displayed special respect for one counsel or another”, says the British Columbia Court of Appeal in *Middelkamp v. Fraser Valley Real Est. Bd.*, *supra* (C.A.) at 261 (B.C.L.R.) (para. 11).

[29] To have any legal effect, an apprehension of bias must be reasonable, and the grounds must be serious, and substantial. Real likelihood or probability is necessary, not a mere suspicion: *R. v. R.D.S.* [1997] 3 S.C.R. 484, 532 (para. 112). The threshold is high: *id.* at 532 (para. 113). The test of appearance to a reasonable neutral observer does not include the very sensitive or scrupulous conscience: see *Wewaykum I.B. v. R.*, *supra* (para. 76); cf. *Makowsky v. Doe*, *supra* (para. 22). This challenge is “favor”, not interest, says the British Columbia Court of Appeal in *G.W.L. Prop. v. W.R. Grace*, *supra*. No reported case disqualifies a judge because of friendship, says the British Columbia Court of Appeal in *Wellesley L. Trophy Lodge v. BLD Silviculture*, *supra*.

[30] Furthermore, a judge is presumed to be faithful to his or her oath, and it takes cogent evidence to displace that, and to show that the judge has done something to create a reasonable informed apprehension of bias: see *R. v. R.D.S.*, *supra* (paras. 32, 49, 112, 117).

4. Reputation or Liability

[31] Deloitte is not a party to either appeal.

[32] But now for the motion to disqualify, the Edmonton assessor’s counsel tries to link the two appeals, by suggesting that the very reputation of Deloitte is in issue in the Boardwalk case. There

is not a shred of evidence of that, whether in the appeal books or in the affidavits now filed for the motion to disqualify. Nothing in the Boardwalk case, including any of the argument on the merits, reveals any credibility dispute about the evidence given by anyone. Boardwalk and the assessor led competing expert evidence before the Municipal Government Board; but it simply preferred the opinion of the assessor's witness, and it thought some of Boardwalk's evidence was legally irrelevant.

[33] The assessor's new suggestions for this disqualification motion, that Deloitte's reputation is at stake in the Boardwalk appeal, or that the third judge might be feared to be concerned to prop it up, are mere speculation, and extremely far-fetched at that. The third judge's Calgary house appeal did not involve evidence by any of the same witnesses. And the assessor's new notion, that unless Boardwalk wins it is about to sue Deloitte, is simply plucked out of thin air. I repeat the need for cogent evidence: see subpart 3 above.

[34] Indeed, there is evidence. Each party to this disqualification motion has filed an affidavit. That seems proper (though doubtless such evidence is confined to the disqualification motion and is not admissible on the appeal itself).

[35] Boardwalk's senior Vice President of Rental Operations deposes that he personally oversaw the relationship with Deloitte. He says that though these accountants advised and assisted Boardwalk, Boardwalk made its own decisions, including all the decisions as to what information to provide in response to the assessor's information requests. He says those accountants merely passed on what Boardwalk provided, and the accountants did not decide that.

[36] He also deposes that "this dispute is not about Deloitte, and whether Deloitte provided a sufficient response . . .". His affidavit makes it impossible to infer that Boardwalk blames the accountants, that it would sue them, or that anyone would want to decide the appeal one way to prop up the reputation of the accountants.

[37] In any event, the supposed interest of Deloitte is more remote and indirect than the supposed interests of clients of a firm of solicitors, or the economic viability of a tenant, which produced no legal disqualifications in the different cases decided together in *Locabail (U.K.) v. Bayfield Prop.*, [2000] Q.B. 451, [2000] 1 All E.R. 65 (C.A.).

5. Timing

[38] The Edmonton assessor's counsel dramatizes the timing, saying that the Municipal Government Board gave an oral decision on the Calgary house appeal four days after oral argument before the Court of Appeal in the Boardwalk case.

[39] But I cannot see that timing matters much here. The best that can be said for the Edmonton assessor here is that the Calgary appeal was not ancient history, and so presumably was not

forgotten. A trial judge used the same law firm used by one party (to revise the judge's will) the day before the trial, in *Taylor v. Lawrence, supra*. The Court of Appeal found no bias.

[40] Besides, the timing here involves less than meets the eye, and much coincidence. The letter of the third judge shows that this judge was not personally involved in the hearings of the Calgary house appeal by either Board, and merely learned the result later. Nor did the third judge even meet the Deloitte advocate, still less do so anywhere near the December hearing date. The Municipal Government Board's written reasons came out still later.

6. Different Issues

[41] It is plain that the home tax appeal by the third judge involved a different municipality, totally different facts, and different issues. It was purely about what other houses were comparable, a narrow question of fact. There does not seem to have been any legal issue in the Calgary house case. Information requests, or barring appeals because of them, did not arise in that case. Deciding any or all issues in the Boardwalk appeal could not have helped or hurt the appeal about the third judge's house, still less do so now. And all the parties were totally unrelated. So any suggestions in *Benedict v. R.* (2000) 136 O.A.C. 259, 193 D.L.R. (4th) 329 (C.A.) and *Liszkay v. Robinson*, 2003 BCCA 506, [2003] 10 W.W.R. 441, 187 B.C.A.C. 111 (C.A.) are patently inapplicable to the present case.

[42] The legislation and topics in the Boardwalk case did not arise in that Calgary house appeal.

7. Boardwalk Appeal is on Legal Topics

[43] This is not a case where the third judge heard a witness testify who also acted for this judge (or had done so). The Court of Appeal heard no evidence in the Boardwalk appeal (save the two affidavits filed later solely for this disqualification motion). Nor did the Court of Queen's Bench. The oral evidence was heard only by the Assessment Review Board (which kept no transcript and gave a virtually useless skeletal summary of the oral evidence), and by the Municipal Government Board. (The Municipal Government Board had the exhibits from the Assessment Review Board, but did not look at them.)

[44] In the Boardwalk appeal, no one has even suggested that the Court of Appeal should accept the evidence of a Deloitte witness in preference to the conflicting evidence of some other witness. There was not much dispute about the standard of review which the Court of Appeal should apply to factual questions, and no one suggested that that standard should be correctness. (The appellant Boardwalk suggested correctness only for certain extricable questions of law, including statutory interpretation.) Still less did counsel suggest that the Court of Appeal should consider any questions about the credibility of the Deloitte expert witness. Nor were the two Deloitte witnesses the only witnesses whom Boardwalk called before the Municipal Government Board. Robert Metcalf also testified, and he said that he was a freelance tax assessor from British Columbia.

[45] In any event, knowing an important witness is not a ground to disqualify a judge from sitting on an appeal from the trial; it produces no reasonable appearance of bias. Here are some examples when a judge can hear a trial:

- (a) An important witness works for the complainant, which used to be an important client of the judge before he was appointed to the Bench, which witness instructed the judge on some files some years before: *R. v. Quinn*, 2006 BCCA 255, 227 B.C.A.C. 83, 209 C.C.C. (3d) 278, 291, 292, 294.
- (b) The witness is the son and brother of lawyers who had been the judge's former law partners, even his mentor. See the decision of the Privy Council in *Man O'War Stn. v. Auckland (City) (#1)*, *supra*.
- (c) Important controversial expert evidence will be given by a professional person with whom over the years the judge has had some professional and social contact: see *Ibrahim v. Giuffre* (2000) 258 A.R. 319, 46 C.P.C. (4th) 114, affd. and adopted (2000) 255 A.R. 388 (C.A.).
- (d) An important expert witness lives two blocks from the trial judge, and the trial judge once chatted socially with him : see *Agar v. Morgan*, 2003 BCSC 628 (Apr. 24). Cf. *Halliburton Enr. Services v. Smith Int. (N. Sea)* [2006] EWCA Civ. 1599, [2007] Bus. L.R. 46.
- (e) The judge has doubts about the credibility of evidence about a certain lawyer, partly because the judge had known that lawyer professionally for 35 years: *R. v. Mohan* (1994) 162 A.R. 6, 12 (paras. 30-32), leave den. (1995) 190 N.R. 399 (S.C.C.).
- (f) There is evidence about certain conduct of a lawyer, and the judge can make fact findings about that lawyer, even if previously there had been a somewhat acrimonious split between that lawyer and a law firm in which the trial judge was then a partner. See *Amethyst Petr. v. Primrose Drilling Ventures*, 2007 ABCA 355, [2007] A.R. Uned. 601, [2007] A.J. #1242 (Nov. 19), leave den. Mar. 27, 2008 (S.C.C.).
- (g) A newly-appointed judge hearing a trial about and against a retired judge of the same court (and who was a lawyer when she was): *Chaba v. Greschuk* (1992) 127 A.R. 133, 134 (C.A.).
- (h) A member of a statutory tribunal can finish a reserved judgment after accepting a job with the government, even if the government is a party to the case reserved: *Eckervogt v. R.*, 2004 BCCA 398, 241 D.L.R. (4th) 685.

- (i) A tribunal can rule on accident benefits for an injured politician, even if one member of the panel supports a different political party: *Fletcher v. Auto. Injury Comp. App. Comm. (#1)*, 2004 MBCA 192, [2006] 3 W.W.R. 54, 190 Man. R. (2d) 277, leave den. (2005) 345 N.R. 196 (S.C.C.).
- (j) A trial judge is a former Crown prosecutor who earlier had prosecuted the accused whom he is now trying, for earlier different crimes: *R. v. Walker* (1968) 63 W.W.R. 381 (Alta. C.A.); *R. v. Dorscheid* (1991) 116 A.R. 79 (C.A.).

[46] The alleged flaw here was much weaker and more indirect than the facts in the cases just listed where a judge was not legally obliged to step down.

[47] It is obvious that none of these considerations applies to the rest of the panel, who never consulted Deloitte and know none of the individuals involved.

C. Improper Jumps in Reasoning

1. Mechanical Rules

[48] In this area, it is important to proceed rationally, examining actual facts. One must neither rely on mere labels, mental rubber stamps, nor mechanical rules. One must weigh rationales, justice, and practicality, and not lose sight of them: *Wewaykum* case, *supra* (at para. 77); *Rando Drugs v. Scott*, 2007 ONCA 553, 284 D.L.R. (4th) 756 (Ont. C.A.); *Ebner v. Official Trustee, supra* (H.C.A.) (paras. 30, 32). The standard is the hypothetical informed observer, who must “view . . . the matter realistically and practically – and having thought the matter through”: *Cdn. Pac. v. Matsqui I.B.* [1995] 1 S.C.R. 3, 50, 177 N.R. 325 (para. 81).

[49] That mandatory approach leads to three cautions. First, the rules to disqualify solicitors for conflict of interest are based on presumed confidential knowledge, and are very different from and less flexible than, the grounds to disqualify a judge from sitting: see *Kapelus v. U.B.C.* (1998) 110 B.C.A.C. 82, 61 B.C.L.R. (3d) 308, 316 (para. 26); *Rando Drugs v. Scott, supra*, at 765 (paras. 28-29). Second, a financial interest is not the same thing as a state of mind, and the rules for the two differ sharply: see *Locabail (U.K.) v. Bayfield Dev. Prop., supra*; *G.W.L. Prop. v. W.R. Grace, supra*, at 289; cf. *Wewaykum I.B. v. R., supra* (paras. 69-72). Third, indirectness or degrees of separation heavily dilute both kinds of conflict.

[50] Obviously a judge cannot sit on his or her own case. And if he or she has more than a small financial interest, courts deem it to be his or her own case.

[51] The law does not let judges sit in judgment over their spouses or close relatives either; but that is not ordinarily because the judge has a financial interest: it may be because of friendship, knowledge, or maintaining family harmony. (See the cases cited two paragraphs above.) And in

Canada, one tends to assume that the ban on hearing a close relative's own lawsuit applies equally to hearing the close relative as counsel for an unrelated litigant. (The English Bench and Bar do not assume that of counsel, and Americans temper it somewhat.) Even if a judge should not hear his own lawyer (in an unrelated suit), identity of interest is not necessarily the reason for the disqualification.

[52] But some Canadian commentators may rely on such dubious assumptions, as they use some mental shortcuts and shorthand forms of speech. I do not agree with them. I will give examples of this error. A Canadian lawyer or judge may try to codify the rules of conflict of interest in his or her head, along the following lines. The **theory** would be that two people are deemed to be joined (i.e. treated as one person) if they are either

- (a) members of the same partnership, e.g. a law firm, or maybe share office space to practise (as the Law Society of Alberta's Code of Professional Conduct suggests),
- (b) married to each other, or are in a "common-law" or similar long-term relationship, or
- (c) parent and child, or siblings.

[53] So far, that theory might sound fairly plausible. But a big fallacy creeps in if one assumes that all that is automatic and inflexible, and applies equally to indirect relationships. The arithmetical consequences would be astonishing. Such "rules" would deem the average judge immediately linked to about 6 people (e.g. spouse, parents, siblings, children). And 6 such people for each of a judge's relatives. To avoid double counting I say 4, after the first step. Then at the first circle, the average judge would be deemed joined to 6 people, at the second circle 24 people, and at the third circle 96 people, and at the fourth circle 384 people, and so forth.

[54] Moreover, judges' spouses and relatives may well be professional (or business) partners of anyone. Canada has some very large accounting firms and law firms. So if even one relative of a judge is a partner, then the number of people deemed associated with the judge would grow at each stage of computation: at least 6, then 35, then 140, then 560. Even that is probably low; with large numbers like that, someone else will also be a partner in a law firm. It is fairly common for a judge or lawyer to be married to a lawyer. It is even more common for a judge's child to be a lawyer or an accountant. One should then multiply by 10, not by 4.

[55] If one fell into the lazy use of such "rules" of deemed association, all the partners in all the bigger law firms in Alberta could be linked to each other. Under such "rules", most judges could only hear lawyers practising alone (not sharing office space with a firm), and those in very small firms. Many law firms could appear before only a handful of judges. See *Makowsky v. Doe, supra*.

[56] On top of that, if one deemed a judge to be connected to any law firm who represents the judge in some unrelated matter (e.g. probating his or her parent's will), the linked people would be much larger. If one also extended such connections to the judge's accountants, the numbers would bloat. And if one extended that still further to witnesses, or to persons whose reputation might be at stake in litigation, the number of persons and cases which a judge cannot hear would become enormous. Few lawyers could appear before most judges, and some judges could hear very few cases.

[57] Then no judge could confidently hear any case. Before hearing a case, a judge cannot tell who are all the people indirectly involved in it. So he or she cannot avoid such alleged conflicts beforehand. Mechanical connection rules would cause retroactive attacks on judgments, causing great expense and delay. See *Ebner v. Official Trustee* (1999) 91 F.C.R. 353, 161 A.L.R. 557 (Aust. F.C.A.) (para. 47), affd. [2000] H.C.A. 63, 205 C.L.R. 337, 176 A.L.R. 644, 75 A.L.J.R. 277.

[58] This fallacy is worse than inconvenient and unworkable. It is all mindless technicalities. Conflicts of interest are not extension cords, which can be plugged into each other until they are hundreds of metres long.

[59] A more sensible approach is found in *Rollings v. Gallant* (1983) 43 N. & P.E.I.R. 320 (P.E.I. C.A.) (para. 19). It says that though his or her children or children-in-law do not appear before a judge, that does not extend to partners of such close relatives. Similar is *G.W.L. Prop. v. W.R. Grace & Co.*, *supra*. See also the repudiation of indirect conflicts in *Middelkamp v. Fraser Valley Real Est. Bd.* [1993] B.C.J. #2965 (S.C.) *supra* (paras. 7-15), affd. (CA 1993) 83 B.C.L.R. (2d) 257. Cf. *Makowsky v. Doe*, *supra*.

[60] I see no reason whatever to bar a judge from hearing argument by (say) his brother-in-law's lawyer, or her lawyer's brother-in-law, if neither is involved or interested in the suit. And if a judge is married to a lawyer who is a partner in a large law firm, the judge can properly hear an unrelated trial where the litigant is the parent or the sibling of one of the partners in that law firm. Not all employment of a judge's relatives may bar a big law firm from appearing in the relevant courtroom.

2. Interest or Bias is Not *Ex parte* Communication

[61] Some lawyers or writers may attempt to link people automatically because of vague memories of reading in law school *R. v. Sussex JJ. ex. p. McCarthy* [1924] 1 K.B. 256, 93 L.J.K.B. 129 (D.C.). That is the brief decision containing the pregnant *dictum* about appearance being as important as reality. But that aphorism is usually cited without referring to parts 1 and 3 of the Supreme Court of Canada's modern qualification, that bias requires the appearance to a

1. reasonable thinking
2. neutral observer

3. knowing the relevant facts.

See *Wewaykum I.B. v. R.*, *supra*, at para. 60, quoting *Ctee. for Justice & Liberty v. N.E. Bd.* [1978] 1 S.C.R. 369, 394; *Taylor v. Lawrence*, *supra*, at p. 548 (Q.B.). On the need for knowledge, see also *Middelkamp v. Fraser Valley Real Est. Bd.* (C.A.), *supra*, at 261 (para. 14).

[62] Furthermore, the *Sussex Justices* case had nothing to do with the justices' interest or perceived interest, still less their mindset. It was a case about possible *ex parte* communications. A partnership of solicitors in a small town had one partner who acted for the victim of a motor vehicle accident. The other partner was the clerk to the lay justices of the peace and so their legal adviser. In a prosecution involving the same accident and drivers, the solicitor/clerk retired with the justices after evidence to help them (if needed) reach their decision. That was held improper.

[63] Why? Because of the legal partnership, which was retained to act for the complainant as his or her advocate. Since the other partner who acted for the complainant retired with the justices, it would have appeared that one side to the dispute could have had private communications with the justices. There was no suggestion that the justices had any interest in the dispute or either side of it.

[64] In the present Boardwalk appeal, no one's advocate has consulted with or been improperly involved with the Court of Appeal. Nor would vigorous exchanges during oral argument change that: see *R. v. Quinn*, *supra*, at 295-96. And the assessor here disclaims any suggestion of actual bias. So the *Sussex Justices* case has no application here.

[65] Nor must one draw from the *Sussex Justices* case the notion that it is more important to have the appearance of justice than to have the reality: see *Ebner v. Official Trustee*, *supra* (para. 49) (citing English cases).

D. Conclusion About the Third Judge

[66] For the reasons given above, and for the reasons which that judge has expressed in this matter, I agree that here the third judge is not legally disqualified from sitting.

E. Is the Rest of the Panel Disqualified?

[67] Strictly speaking, I need say no more. But what if everything above were incorrect, and somehow the third judge were deemed in law to be disqualified? That would not automatically disqualify the rest of the panel hearing the Boardwalk appeal, for the following reasons.

[68] Obviously the mere presence on the court of one appellate judge who is (allegedly) disqualified does not disqualify the other members of that court.

“ . . . No reasonable person would think, after Abella, J., voluntarily recused herself, that her mere presence on the Court would impair the

ability of the balance of its members to remain impartial. If there is a duty on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the Court or compromises the integrity of the whole Court. To reach that conclusion would be to ascribe a singular fragility to the impartiality that a judge must necessarily show, and to the ability of judges to discharge the duties associated with impartiality in accordance with the traditions of our jurisprudence.”

– *Mugesera v. Canada* (#2) 2005 SCC 39, [2005] 2 S.C.R. 91, 335 N.R. 220, at 227

See also *S.G. v. Larochelle*, 2005 ABCA 111, 363 A.R. 326, 329 (paras. 3-5).

1. A Judge Cannot be Influenced by the Unknown

[69] Appearance to the reasonable bystander must not be stretched too far. No judge can be influenced, consciously or unconsciously, by what he or she does not know. Such unknowns do not ground a reasonable apprehension of bias, or request that a judge step aside as disqualified. The English Court of Appeal so held in *Locabail (U.K.) v. Bayfield Prop., supra*, and the Supreme Court of Canada expressly adopted that rule in *Wewaykum I.B. v. R., supra* (para. 88).

[70] Here the rest of the panel did not know that the third judge had a tax appeal, or accountants, until counsel for Edmonton’s assessor told the panel that on January 31 or February 1, 2008. Nor should the third judge have told the rest of the panel; there was no reason to disclose this irrelevant event. That unknown connection with someone cannot have influenced the rest of the panel.

2. A Party Cannot Create Disqualification

[71] Nor may one argue along these lines: “now the cat is out of the bag and cannot be put back in; the rest of the panel now knows the connection.” Apart from the fact that the “connection” is too remote as to be relevant, only the Edmonton assessor brought the bagged cat to this appeal and opened the bag. And he did so at the end of argument.

[72] Other litigants have sometimes tried to rely upon their own acts as creating a conflict of interest or bias, and asked the judge in question to step aside as a result. Sometimes the litigant has revealed a fact, sometimes made an accusation against the judge, or sometimes tried to have the judge disciplined by the appropriate judicial council. Such litigants’ attempts at self-help by engineering perceived conflicts are firmly rejected, for obvious reasons of justice and policy. See *McElheran v. R.*, 2006 ABCA 161, [2006] A.R. Uned. 869, Calg. 0401-0338-AC (May 26); *Mattson v. ALC Aircraft Can.* (1993) 18 C.P.C. (3d) 310, 317-18 (B.C.); *Allain Sales etc. v. Guardian Ins. Co. of Can.* (1996) 180 N.B.R. (2d) 338, 50 C.P.C. (3d) 273, 279-80; *Suresh v. Min.*

of Cit. & Imm. (2000) 258 N.R. 119, 122 (F.C.A.) (para. 9); *Middelkamp v. Fraser Valley Real Est. Bd.* (S.C. B.C.), *supra* (para. 25); cf. *S.G. v. Larochelle, supra*.

[73] That leads to a related and overlapping issue.

[74] Tactical and opportunistic recusal motions could pose a danger which is magnified in Courts of Appeal. Those courts read written argument (factums) ahead of time. So they often engage counsel in pointed discussion during the oral hearing, in a manner uncommon before trial judges. During such oral argument, counsel often think that they see which way the wind is blowing. Careful examination of the cases cited above shows that in many cases, the motion to disqualify was made at or after argument in the suit.

[75] And that danger could be still more acute when the Court of Appeal asks counsel for further written argument on some issue or on some particular authority.

[76] I do not suggest that that is anyone's motive here. The assessor may well have learned the facts accidentally or routinely. But if the rest of the panel were to withdraw here, counsel in some later appeal who thought that the wind was blowing the wrong way, would have a powerful incentive. He or she might search out whether any member of the panel had a cousin, lawyer, accountant, physician, or neighbour who had been somehow involved with any of the parties, with any of the counsel's law firms, with any of the witnesses, or with any of the issues.

3. Alberta Appellate Judges Do Their Own Work

[77] In the *Wewaykum* case, *supra*, counsel suggested that one Supreme Court of Canada judge had a conflict and had then "infected" the whole panel as a result. The Supreme Court of Canada rejected that by saying that its judges do their own work and reach their own decisions. See *Wewaykum I.B. v. R., supra*, at para. 92.

[78] As stated there, after oral argument and reserving decision, the Supreme Court of Canada always holds an immediate conference of all the members of the panel; there each judge expresses his or her view on the merits, with some reasons. So the *Wewaykum* case cannot be distinguished on any theory that those judges never discuss the merits, and merely file 9 separate judgments. Moreover, in *Wewaykum* the bias objection arose after the Supreme Court had given its judgment on the merits.

[79] And of course the rules to test bias depend upon the views of a **well-informed** reasonable person: see Part D, *supra*.

[80] Therefore, some similar mention of Alberta Court of Appeal's working methods is very apt here. For the reasons below, its judges also work independently.

[81] The Supreme Court of Canada's words in *Wewaykum* (para. 92) also apply to the Alberta Justices of Appeal: each member of the Court of Appeal prepares independently for the hearing of appeals. All judges prepare fully. None sits back and depends on some assigned member of the Court of Appeal to go through the case so as to "brief" the rest of the panel before the hearing.

[82] See also *Ultracuts Franchises v. Wal-Mart Can. Corp.*, 2005 MBQB 222, 196 Man. R. (2d) 163, 19 C.P.C. (6th) 355 (paras. 60-65).

[83] The fact that *Wewaykum* and this judgment have now discussed the court's internal workings in a judgment suffices for future reference. It does not mean that any future party who alleges bias can get a bigger peek behind the curtain. Any future occasion for further examination of the Court of Appeal's internal operations should be rare or non-existent. Deliberative secrecy or privilege exists for a reason, and should not be lightly waived, let alone permanently be discarded. Cf. the discussion in *Cherubini Metal Works v. A.-G. N.S.*, 2007 NSCA 37, 253 N.S.R. (2d) 134, 282 D.L.R. (4th) 538 (paras. 14-18). Deliberate secrecy is stronger for courts than for administrative tribunals.

4. Infection Arguments are Dangerous

[84] In England, barristers are sole practitioners, never partners. There, sharing office space (chambers) is never thought to create any kind of conflict. Two barristers whose individual offices are beside each other, can appear on opposite sides of the same trial. See *Taylor v. Lawrence, supra*, at 548 (Q.B.). Maybe all partners in a law partnership of solicitors are all lawyers for all clients of the firm (in England and Canada). But it is dangerous to extend such analogies to judges' office sharing or "co-employment". Cf. *Bygrave v. Royal Coll. of Dental Surgeons* (2006) 218 O.A.C. 104 (D.C.).

[85] Canada routinely appoints former Crown prosecutors as judges. Almost all were full-time government employees, in prosecutors' offices of varying sizes, some very small, some large. Canadian courts never disqualify such judges from hearing criminal trials which were "in the office" before they were appointed. If courts did, many Provincial Court judges would have little to do the first few years after their appointment, and the chaos and delay in towns or cities with only one resident judge would be appalling. See *R. v. Melnichuk*, 2004 BCCA 332, 200 B.C.A.C. 212; *R. v. Teskey* (1995) 167 A.R. 122, 126-30. The same is true of higher officials in a Department of Justice: *Wewaykum I.B. v. R., supra* (para. 84).

[86] Therefore, one must be very careful of any suggestion that judges working together "taint" each other. If they did, then when one Queen's Bench judge had a conflict, all Queen's Bench judges (or all judges in the same big city) would be barred from sitting too. No one accepts that view, especially as a number of judges are married to barristers who appear in court most weekdays, and more are married to partners in big law firms. Still more have children who are partners in law firms.

[87] So the word “taints” is a mere pejorative analogy. This motion is not about objects or chemistry. This motion deals with judges who are presumed independent and who have taken an oath, as the modern English and Canadian cases repeatedly emphasize.

[88] All appeal courts in Canada but two circulate draft judgments on important legal topics to the whole court for comment. If mere participation on a panel by one judge with a conflict were a ground to disqualify all the panel, then once a draft was circulated, all the court would be presumably disqualified. Not even naming a new panel would solve the supposed problem. The court would either have to sit despite the conflict (using the necessity doctrine), or refuse even to hear the appeal. Neither alternative is palatable, and the latter is likely impossible, and certainly very unfair. The thesis of tainting is unsound and far removed from actual unfairness.

5. Authority

[89] I have not seen, nor found, any authority in England or Canada which would support the rest of the panel’s withdrawing from this case. That is so even if (contrary to my views) the third judge had somehow become disqualified. A number of cases cited above show that the rest of the panel’s withdrawing is unnecessary.

[90] As noted above, the presumption is of judicial impartiality, not bias, nor appearance of bias. And the test is not suspicion or mere possibility. See Part B.3 above. No evidence whatever has been given about any appearance of partiality of the rest of the panel.

[91] The assessor relies upon a proposition in Professor Laux’s text which the Alberta Court of Appeal used in *Mtn. Creeks Ranch v. Yellowhead S.D.A.B.*, 2006 ABCA 126, 48 Admin L.R. (4th) 130. But that case is distinguishable here, because it was

- (a) about lay subdivision and development appeal boards, which often include elected politicians (and the textbook only mentions administrative tribunals),
- (b) about fixed opinions by a politician, and
- (c) contrary (as to courts) to the *Wewaykum* case, *supra*, which was decided after the passage was written in the textbook.

The authorities cited by Professor Laux (including authorities which they cite) are all about administrative tribunals, not superior courts. One should recall the presumption from a judge’s oath and need for cogent evidence, as discussed in Part B.3, *supra*. And recall that judges routinely hear information which they must then put out of their minds.

[92] I will discuss s. 8 of the *Court of Appeal Act* below. I see no reason to read it narrowly, nor exclude it from disqualification situations; indeed, it has been applied to disqualification situations in the past. Section 8 plainly indicates that the rest of the panel can continue in such a case.

F. Dangers of Unnecessary Recusal

[93] Until recent years, there was little Canadian or English case law on disqualification of judges. Doubtless one reason was that many judges would decline to hear a case if there was any hint of a conflict or its appearance. When the court is a large trial court whose judges sit alone, with little prior preparation, such a practice often seems to be the easy way, doing little harm. And one judge leaving a multi-judge panel often causes no harm.

[94] But disqualification brings dangers in other situations, especially disqualifying the whole panel after lengthy argument. Therefore, giving the objecting party the benefit of the doubt, and forcing judges to withdraw in doubtful situations, must not become the law: *Allain Sales v. Guardian Ins.*, *supra*, at 280; *R. v. Quinn*, *supra*, at 292-23, 295; cf. *Mattson ALC Airlift Can.*, *supra*, at 317-18; cf. *Wewaykum I.B. v. R.*, *supra* (para. 78). See Canadian Judicial Council, *Ethical Principles for Judges* (para. E.3) (1998); *Locabail (U.K.) Bayfield Prop.*, *supra*; *De Cotiis v. De Cotiis*, 2004 BCSC 117 (Jan. 21); *Taylor v. Lawrence*, *supra*, at p. 549 (Q.B.); *Agar v. Morgan*, *supra*; *A.-G. Can. v. Khawaja*, 2007 FC 533 (March 30) (paras. 57-58, 61-63); *Makowsky v. Doe*, *supra* (para. 17).

[95] I will now describe seven dangers which arise if the sole judge assigned (on a trial court) withdraws unnecessarily, or if two or three judges on an appellate panel withdraw. (As noted, only one of the three withdrawing usually poses fewer dangers. So I cannot criticize, and am not criticizing, the decision of the third judge to withdraw here.)

1. Judge Shopping

[96] In the last few years, Canada has seen a host of unsuccessful attempts to make Canadian judges step off cases, or to upset judgments, because of alleged conflicts. The grounds then suggested (especially when complaining of previous decisions by the judge) usually contained a big hint: that counsel wanted a more favorable judge. The cases are too numerous to cite here. See the cases judicially considering the *Wewaykum* case, *supra*, and other cases cited here, and those listed in Stevenson & Côté, *Civil Procedure Handbook 2008*, p. 426 (R. 391 n., para. 7).

[97] When no jury is involved, some litigants assume that judge shopping might pay some dividends, and some counsel act on that.

[98] Increasing, combining and extending the grounds to disqualify judges from sitting would multiply litigants' temptations to manipulate the composition of the court. What if judges were to withdraw unnecessarily to avoid doubt, or to make the party complaining feel better? They would then tend to reward parties who judge shop. See *R. v. Werner*, 2005 NWTCA 5, 205 C.C.C. (3d)

556; Perell (2004) 29 Advocates' Q. 102, 107-08; *Ultracuts Franchises v. Wal-Mart Can. Corp.*, *supra* (paras. 21-22); *Makowsky v. Doe*, *supra* (para. 17); *Clenae Pty. v. Quick* [1999] 2 V.R. 573 (Vict. C.A.) (para. 9), *affd.* [2000] H.C.A. 63, 205 C.L.R. 337, 176 A.L.R. 644, 75 A.L.J.R. 277. See para. 20 of the High Court's decision.

[99] See Part E.2 above, which overlaps with the present topic.

2. Delay and Expense

[100] If any Court of Appeal panel is disqualified after oral argument (as the Edmonton assessor proposes here), then heavy expense and delay will fall upon the shoulders of the two opposing parties and on the public. See *Middelkamp v. Fraser Valley Real Est. Bd.*, *supra* (S.C.) (para. 26); *Ultracuts v. Wal-Mart*, *supra* (paras. 21-22). Three more justices of appeal must duplicate all the work to date, and the parties must pay their lawyers to redo all the oral argument (and maybe more). On top of that is the delay and expense occasioned by the disqualification motion itself. Cf. *Clenae Pty. v. Quick*, *supra* (paras. 58-59, 91-92). Boardwalk complains of that here, and is entitled to complain. The theoretical and technical perfection and peace of mind which the assessor seeks could be gained only by telling Boardwalk to go back to square one and relitigate at its own expense.

[101] The events in question here are almost five years old, and a preliminary point is still being litigated.

[102] Furthermore, if judges must constantly look out for remote connections or borderline grounds to disqualify, every Chief Justice in Canada will spend even more time, and have even more problems, naming judges to trials or appeal panels. That is already far more difficult than outsiders would imagine. As noted above, most judges have a spouse or a close relative connected somehow to a law firm, or to a government or a large company which often litigates. And all judges know counsel, because the judges were at the Bar for over a decade: the *Judges Act* requires that for appointment.

3. Tarnished Appearance

[103] The tests for bias are largely framed to maintain reasonable appearances. What if judges often withdrew, or had to, because of remote or technical connections, and as a result cases were often postponed, reargued after judgment, or upset on appeal? Then the courts and all Canadian justice would look at least incompetent and Dickensian. See *Ultracuts v. Wal-Mart*, *supra* (para. 22), quoting the Victorian Court of Appeal in *Clenae Pty. v. Quick*, *supra* (para. 9), and *Ebner v. Official Trustee*, *supra* (para. 37).

4. Producing Insoluble Problems

[104] Extreme and indirect notions of disqualification would disqualify whole courts, so no judges would be legally qualified, a problem impossible to solve entirely. See Part E.4 above. Some litigants would like that.

5. Preventing Litigation by Judges

[105] Though a judge should not sue or appeal lightly, judges have rights too, and they should not be pushed into positions where the public know that they can sue, shortchange or injure the judge because he or she cannot sue or defend. See *Taylor v. Lawrence, supra*, at pp. 551-4 (Q.B.). See Part B.2 above.

6. Litigation Over Litigation and Technicalities

[106] Reformers worked for much of the 19th and 20th centuries to remove technicalities and delays from the law, trying to make it more flexible, just, and efficient. That resolve of courts and academe to focus on substance and justice may be waning; technicalities are multiplying again.

[107] Automatically and mechanically disqualifying whole panels because of deemed or ostensible technical connections and presumptions, would be a big slide backwards. Worse, it would invite litigants to devote their resources and ingenuity to mining and trolling for technical coincidences. That activity is socially useless and wasteful on several levels.

7. Some Connections Are Almost Unavoidable

[108] See Part B.2 above.

G. Conclusion

[109] In my view, the third judge was not legally disqualified. Whether or not that is so, the rest of the panel are not disqualified, for all the reasons given above.

[110] The third judge has now decided to take no part in deciding this appeal. Where does that leave the rest of the panel? Whatever the third judge's reason for withdrawing, that judge is gone from the panel and cannot be forced to return.

[111] Section 8(1) of the *Court of Appeal Act* reads as follows:

“If any matter before the Court has been heard by 3 or more judges and is standing for judgment and one of the judges who heard that matter

- (a) is transferred to any other court,
- (b) resigns that office,
- (c) dies,
- (d) is absent through illness or other cause, or
- (e) is for any other reason unable to act,

then the remaining judges may, if unanimous in their decision, give judgment on behalf of the Court notwithstanding section 7.”

Its words “ is absent through . . . other cause, or is for any other reason unable to act” therefore apply here. Counsel pointed out two past cases where a three-judge panel shrank to two because of disqualification. In another case argued before the Alberta Court of Appeal, seven judges shrank to five. One of the judges elected to take no further part; another was appointed to the Supreme Court of Canada. In all cases, the remainder gave judgment on the merits if unanimous.

[112] The remaining panel here can therefore go on. It is not obliged to withdraw, and should not withdraw, for the reasons given in Parts E and F above. The rest of the panel should consider the appeal on the merits. If unanimous, it should decide the appeal on its merits.

[113] If the rest of the panel can so decide the appeal, costs of the disqualification motion should be considered when deciding the merits.

Motion filed February 27, 2008
Further written arguments filed
March 18, 2008 and April 3, 2008

Reasons filed at Edmonton, Alberta
this 15th day of May, 2008

**Reasons for Judgment Reserved of
The Honourable Mr. Justice O'Brien on Disqualification
Concurring in the Result**

[114] The facts and circumstances relating to this application are fully set out in the judgment of Côté J.A. I accept and agree with the conclusion of the third judge that no legal disqualification applies to that judge's circumstances. However, that judge has voluntarily decided to take no further part in the proceedings, leaving it to Côté J.A. and me to give judgment.

[115] I rest my conclusion that the remaining members of the panel are not disqualified, even if the third judge had been disqualified (which, as I have said, is not here the case), on two relatively recent decisions of the Supreme Court of Canada: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, 209 N.R. 201; *Mugesera v. Canada (#2)*, 2005 SCC 39, [2005] 2 S.C.R. 91, 335 N.R. 220. Paraphrasing from para. 93 of *Wewaykum*, no reasonable person informed of the decision making process of this Court, and viewing it realistically, could conclude that it was likely that the two other judges were biased, or somehow tainted, by the apprehended bias affecting the third judge.

Motion filed February 27, 2008
Further written arguments filed
March 18, 2008 and April 3, 2008

Reasons filed at Edmonton, Alberta
this 15th day of May, 2008

O'Brien J.A.

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