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**Empirical and Comparative Approaches to Judicial Disqualification:**

**The Case for Limited-Scope Statutory Frameworks**

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**Introduction**

Courts in a number of common law jurisdictions have adopted one variation or another of a “reasonable apprehension of bias” test for judicial disqualification that is highly fact-driven and context specific. For example, the English Court of Appeal in the *Locabail* decision emphasized that “every application must be decided on the facts and circumstances of the individual case.”[[1]](#footnote-1) Similarly, the Privy Council has asserted that:

This is a corner of the law in which the context, and the particular circumstances, are of supreme importance.[[2]](#footnote-2)

The Supreme Court of Canada, drawing on these decisions, concluded in *Wewaykum* that:

As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no “textbook” instances.[[3]](#footnote-3)

Despite this assertion by Canada’s highest court, we argue in this paper that statutory rules may well have a useful role to play in the law of judicial disqualification. To advance this argument, we draw on the result of a study we conducted concerning the experience and attitudes of Canadian provincial and territorial judges concerning recusal and disqualification [[4]](#footnote-4) to identify some of the difficulties judges experience in applying the fact-sensitive “reasonable apprehension of bias” test in marginal cases and some of the reasons for these difficulties. We then draw on the experiences in two countries that have, to a significant extent at least, codified judicial disqualification, the United States and Germany. While these codifications typically include a general requirement that judges must not sit on cases where the judge’s impartiality might reasonably be questioned,[[5]](#footnote-5) they often supplement these general provisions by more detailed rules governing when judges are disqualified based on certain facts that might give rise to a concern about their impartiality. Of equal importance, they often contain rules identifying situations which **do** **not**, without more,result in a judge’sdisqualification.

We suggest that there are at least three substantive areas where a rule-based approach to high-frequency bias issues is helpful: professional relationships between justice personnel and litigation participants; prior judicial consideration in the cause or related litigation; and extra-judicial writings suggesting a predisposition. Additionally and importantly, we suggest that procedural rules regarding the timing, evidence and process of recusal motions should be statutorily regulated.[[6]](#footnote-6)

1. **Empirical Research on Difficulties Applying the “Reasonable Apprehension of Bias” Test**

With the assistance of the Canadian Association of Provincial Court Judges (“CAPCJ”), in 2007 and 2008 we conducted a survey of 137 Canadian provincial and territorial judges concerning their experience with and attitudes toward judicial disqualification, a sample that represented roughly 13% of the approximately 1,037 provincial and territorial judges sitting in Canada at the time of the initial distribution of the survey.[[7]](#footnote-7) The results of the survey were presented to the Executive Committee of CAPCJ in 2009 and we eventually published our findings in the Alberta Law Review in an article entitled “The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification”. [[8]](#footnote-8)

The survey was in two parts. The first consisted of a series of 15 introductory questions. They sought background information on the respondent’s level of judicial experience, the size of community where the judge typically heard cases and the type of jurisdiction the judge exercised. In addition, we asked respondents about their personal experience with recusal, and in particular how often the judge recused in a typical year and how those recusals came about. Finally, we asked respondents about general expectations in their jurisdiction concerning particular grounds on which judges might disqualify themselves. The second, and larger, part of the survey sought the views of the respondents on 32 brief scenarios grouped into three categories: (1) professional relationships; (2) social relationships; and (3) knowledge derived from other judicial proceedings. In response to each scenario the respondent was asked three questions: (1) whether he or she would consult a colleague before making a decision on whether or not to recuse; (2) whether the respondent would consult the parties before making a recusal decision; and (3) whether in this situation the respondent (a) would definitely recuse, (b) would recuse if a party objected, (c) would definitely **not** recuse, or (d) was uncertain. [[9]](#footnote-9) We constructed the scenarios in consultation with an Advisory Committee of judges from across the country. The Committee members were asked to help us identify reasonably common situations that appeared to be causing difficulty to judges in their jurisdictions. [[10]](#footnote-10) We described these situations as “analytically marginal” in the sense that, based on the jurisprudence and / or policy, a plausible argument could be advanced for suggesting both that the judge should and should not recuse in that particular situation. [[11]](#footnote-11)

We do not propose to summarize all of our findings here, but three areas are significant for present purposes. The first is that reported decisions significantly under-represent the phenomenon of recusal because most of the time judges recuse themselves of their own motion. Two thirds of our survey respondents (67%) indicated that they recused themselves between 1 and 5 times in a typical year. Another 19% reported that they recused themselves more than 5 times in a typical year, and only 14% indicated that they would not recuse themselves at all in a typical year. More than half of our respondents (55%) indicated that they recused themselves of their own motion more than 90% of the time, and another 30% reported that they recused themselves between 50% and 90% of the time. Only 12% indicated that they never recused themselves of their own motion.[[12]](#footnote-12) These findings are consistent with the observation made by John Leubsdorf that American jurisprudence on recusal and disqualification was weighted heavily in favour of decisions explaining why it was appropriate for the judge to sit, because American judges who decide to recuse themselves typically do so without providing written reasons, so while judges who reject an application that they disqualify themselves are obliged to explain their reasons for doing so in writing. [[13]](#footnote-13)

The second finding that is significant for present purposes is that most of our survey respondents had a very weak sense of common practice concerning issues that are, in theory, governed by local tradition. In Canada the reasonable apprehension of bias test is thought to potentially disqualify judges from hearing cases involving their former clients or lawyers with whom they previously practiced law. This is true even though the judges did not have any personal knowledge of the case from his or her time in practice or a close personal relationship with the lawyer from his or her former firm who is arguing the matter before the judge. The breadth of this prohibition is mitigated by what is described as a “cooling off” period, after which the judge can hear cases involving former clients or being argued by lawyers with whom the judge practiced absent other disqualifying circumstances, such as a close personal relationship with the lawyer of client or personal involvement with the matter prior to the judge’s appointment to the bench. The Canadian Judicial Council’s publication *Ethical Principles for Judges* offers the following advice to Canadian judges:

“. . . With respect to the judge’s former law partners, or associates and former clients, the traditional approach is to use a “cooling off period,” often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge . . .”. [[14]](#footnote-14)

We asked our survey respondents if the courts in their jurisdiction had an accepted “cooling off” period after which it was appropriate for a judge to hear cases where the judge’s former client is a part or the judge’s former firm is representing a party. We asked separate questions for former law firm colleagues and former clients, and the majority of respondents answered that there was no accepted “cooling off” period in both cases. What was interesting to us was that a minority of the judges in most jurisdictions answered “yes” to both questions, though the response that there was an accepted “cooling off” period was stronger for the former law firms than for former clients. Moreover, there were some jurisdictions (Alberta, Newfoundland and New Brunswick) where the majority view was that there **was** an accepted “cooling off” period for law firms, though not for clients.[[15]](#footnote-15) We tested two jurisdictions (Nova Scotia and Ontario) from which we had the largest number of responses to see if there was any correlation between the views of respondents and the number of years the respondent had served as a judge, on the theory that cooling off periods might be of greater significance to judges who were more recent appointees than to judges who had served for a number of years. Admittedly the sample size from these jurisdictions was relatively small (33 respondents from Ontario and 21 from Nova Scotia), but we found that there was no obvious correlation between the judge’s length of service and the judge’s view of whether or not there was an accepted “cooling off” period.[[16]](#footnote-16)

The final observation we wish to draw from our survey is that the “reasonable apprehension of bias” test appears to give very limited guidance to judges in addressing the relatively common but analytically marginal fact patterns that we posed to our survey respondents. This was evident from the high degree of variation we received in the responses to the 32 scenarios. In only **one** of the 32 scenarios was there near universal agreement (more than 90%) on one of the four possible answers we offered to the question of whether or not the respondent would recuse in the situation posed in the scenario. In another 5 scenarios there was clearly a dominant view, with 65% - 89% of the respondents agreeing on a single answer. In another 9 scenarios, between 50% and 64% of the respondents selected the most popular answer. On the other hand, in 17 of the 32 scenarios, no single answer attracted the support of 50% of the respondents. In 11 scenarios the most popular answer attracted the support of between 40% and 49% of the respondents, and in the case of 6 scenarios, no single answer received the support of as many as 40% of the respondents.[[17]](#footnote-17)

Another way the we explored the degree of variability in responses we received was by tracking the number of times each judge gave one of the four answers: (a) definitely recuse, (b) recuse if a party objected, (c) definitely **not** recuse, or (d) uncertain If we take the “definitely recuse” response as an example, 11% of our respondents indicated that they would definitely recuse themselves in 3 or fewer of the 32 scenarios. At the other end of the scale, 8% of the respondents indicated that they would definitely recuse themselves in between 17 and 22 of the 32 scenarios. There was a similar broad range in the “definitely **not** recuse” category. Roughly a third of the respondents (34%) indicated that they would definitely **not** recuse in fewer than 5 of the 32 scenarios. On the other hand, 20% indicated that they would definitely **not** recuse in between 11 and 15 of the 32 scenarios, and 10% gave this answer between 16 and 22 times.[[18]](#footnote-18) While we were able to suggest explanations that offered some potential guidance on why judges would adopt different views in respect of the scenarios we posed,[[19]](#footnote-19) it was evident to us that the personal philosophies of our respondents played an important role and determining whether or not a judge would recuse in many marginal situations.

Elsewhere we have written about how the “reasonable apprehension of bias” test itself could be modified to give judges better a better understanding of the rationale for trends in the jurisprudence that are otherwise difficult to comprehend, and better tools with which to make decisions about whether or not to recuse in marginal cases.[[20]](#footnote-20) Our objective in that article, and in the current paper, is to make the law governing judicial disqualification more transparent and easier to apply consistently. We recognize that one could use the range of views expressed by the judges in our survey to build a case for using statutes to engage in a more thorough reconsideration of the law of judicial disqualification. We have not done so for two reasons.

The first is that the level of disagreement reflected in our survey concerns the application of a well-accepted legal test in marginal cases rather than a fundamental disagreement about core concepts. As we have suggested elsewhere, there are a number of both principled and practical reasons why the core concepts that underlie the reasonable apprehension of bias test are appropriate foundations for the law of judicial disqualification.[[21]](#footnote-21) Indeed, the durability of the “reasonable apprehension of bias” test in common law jurisdictions and its incorporation as a foundational element in the statutory regimes we will be exploring is eloquent testimony to the soundness of the core ideas animating the test.

The second reason we have taken a relatively modest approach to statutory reform is that we are not convinced that making judicial disqualification substantially more difficult or (more likely) substantially easier would fundamentally alter the public perception of the judicial system, at least in Canada.[[22]](#footnote-22) This is not to suggest that we believe that all segments of the Canadian public are equally satisfied with the Canadian judicial system or even that everyone who goes through a legal process in Canada is completely convinced of the judge’s impartiality. Rather, it flows from our view that making laws that are designed to satisfy the public that judges are impartial represents only one element in a larger enterprise of satisfying the public that the judicial system is accessible, efficient, responsive, and one that produces just results. The optimal point of balance among these considerations and the desirability of providing litigants with reassurance about judicial impartiality is likely to be elusive, and in our view there are times when it is more productive to focus on the clarity and consistency of the rules governing judicial disqualification than the precise content of the rules themselves.

1. **Overview of American Law Governing Judicial Disqualification**

In both Canada and the United States, judicial impartiality is a constitutionally protected right.[[23]](#footnote-23) In both countries, the content of the constitutional right to judicial impartiality takes its shape from underlying legal norms about what the legal system’s commitment to impartiality entails, though in the United States considerable discretion is left to Congress and state legislatures to determine the precise parameters of the law governing judicial disqualification.[[24]](#footnote-24) The law in both countries begins with a presumption of judicial impartiality, but there are significant differences in terms of what is needed to displace the presumption of judicial impartiality in the absence of statutory intervention.

The Canadian constitution’s commitment to judicial impartiality has been interpreted in a manner that is informed by the modern common law “reasonable apprehension of bias” test.[[25]](#footnote-25) Our courts have taken the view that, since it will usually be impossible to determine whether or not a judge is actually biased, in law what we are required to do is determine whether there are objective circumstances that would cause a reasonable person to believe that the judge was not impartial.[[26]](#footnote-26) The existence of objective circumstances that would cause the reasonable person to believe that, on balance, the judge would either consciously or unconsciously fail to decide the case fairly are sufficient in Canada to displace the presumption of impartiality. Because common law and constitutional concepts of impartiality are essentially the same, judicial disqualification decisions in Canada are almost invariably made on the basis of common law standards. [[27]](#footnote-27)

American constitutional law governing judicial is influenced by the understanding in that country of the state of pre-revolutionary English common law that took a restrictive approach to judicial disqualification, requiring disqualification only where the judge had a financial interest in the outcome of the dispute.[[28]](#footnote-28) Even though English common law was using a variation of the familiar “apprehension of bias” framework by the mid-nineteenth century,[[29]](#footnote-29) American courts did not modify the common law to adopt an “apprehension of bias”. The due process protections in the United States Constitution have therefore been interpreted as preventing a probability of actual bias on the part of the judge, as opposed to guaranteeing that there will be no appearance that a judge might be biased.[[30]](#footnote-30)

The evolution of American law of judicial disqualification has accordingly taken place primarily through federal and state statutes, though state constitutions and rules of court also contain rules expanding disqualification in circumstances beyond those required by the United States Constitution. These statutes have expanded disqualification in two different ways. One is to adopt a general requirement that judges must disqualify themselves in any proceeding “in which the judge’s impartiality might reasonably be questioned”,[[31]](#footnote-31) supplemented by a series of more specific rules identifying instances in which a judge is disqualified. This approach is inspired by the 1972 ABA Model Code of Judicial Conduct, initially adopted by the ABA’s House of Delegates in 1972 and subsequently modified in 1990, 2007 and 2010. The ABA Model Code is designed as a set of ethical principles governing the conduct and discipline of judges, but the provisions of what was originally Canon 3E, now Rule 2.11, dealing with disqualification were often incorporated directly or with minor modification into statutes that gave parties rights to require judges to disqualify themselves in the circumstances enumerated by the statute. [[32]](#footnote-32) The second approach is to adopt what are described as “peremptory disqualification” rules, which essentially allow a party to a proceeding to disqualify a judge by alleging that the judge has a bias against the party or in favour of a party adverse in interest. Peremptory disqualification provisions have often been interpreted restrictively by American courts,[[33]](#footnote-33) but a significant theme in contemporary American legal discourse is a debate over whether peremptory disqualification should be expanded.[[34]](#footnote-34) American disqualification law at the state level also differs significantly from the law in common law jurisdictions such as Canada and the United Kingdom because it has to accommodate the fact that judges in many states are elected. As the cost of running successful judicial election campaigns has escalated, there has been considerable debate about whether current approaches to judicial disqualification in cases involving contributors to judicial election campaigns are adequate.[[35]](#footnote-35)

For present purposes it is more interesting to explore the more detailed rules governing disqualification found in rules that expand upon a general requirement of disqualification where impartiality might reasonably be questioned than it is to discuss peremptory disqualification. Interesting as the peremptory disqualification and judicial election debates are, they have little resonance in the context of Canada and other comparable jurisdictions. Moreover, because the specific rules governing disqualification can be understood to represent specific examples of a more general requirement of disqualification wherever a judge’s impartiality might reasonably be questioned, one can relatively easily imagine them forming the inspiration for specific rules that could supplement a more general “reasonable apprehension of bias” test for disqualification in Canada and other common law jurisdictions.

The main federal disqualification statute, 28 U.S.C. § 455, and in particular § 455(b)-(f), is a good example of this type of provision. 28 U.S.C. § 455 begins with a general prohibition in subsection 455(a) that states: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Subsection 455(b) begins with the statement that “[The judge] shall also disqualify himself in the following circumstances:”. Subsection (b) has five clauses. Clause (b)(1) requires disqualification where the judge has “a personal bias or prejudice concerning a party” or has “personal knowledge of disputed evidentiary facts concerning the proceeding”. Clauses (b)(2) and (b)(3) deal with the judge’s involvement with the proceeding prior to his or her appointment to the bench. Clause (b)(2) requires disqualification where the judge, while in private practice “served as a lawyer in the matter in controversy”, and where “a lawyer with whom [the judge] previously practiced law served during such association as a lawyer concerning the matter”, as well as where the judge or a lawyer with whom the judge previously practiced law “has been a material witness” concerning the proceeding. Clause (b)(3) requires disqualification in situations where the judge “served in government employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy”.

It is worth pausing at this point to note that these provisions reflect themes that would be familiar to judges applying the “reasonable apprehension of bias” test for disqualification in Canada but are both narrower and in some respects potentially broader than the grounds for disqualification found in the Canadian jurisprudence. Clause (b)(2) is narrower than Canadian disqualification practice in the sense that only requires disqualification where the judge acted as a lawyer at an earlier stage in the same proceeding or a member of the judge’s law firm acted in the proceeding while the judge was still associated with the firm. Canadian law would generally regard the judge’s association with the firm or with the client, whether or not the judge was involved with the matter in question, as a basis for disqualification for at least a period of time. At the same time, clauses (b)(2) and (b)(3) may contain a slightly broader prohibition on judicial involvement in a matter than would be required by Canadian law in the sense that in Canada the passage of time is a relevant consideration for purposes of deciding whether a judge is disqualified.

Clause (b)(4) deals with the judge’s personal financial interests as well as those of his spouse or minor children residing in the judges household, as well as “any other interest that could be substantially affected by the outcome of the proceeding”. Subsection 455(c) admonishes judges to inform themselves about their personal and fiduciary financial interests and to make “reasonable efforts” to inform themselves about the “personal financial interests” of the judge’s “spouse and minor children residing in [the judge’s’ household”. Subsection 455(d) provides a number of definitions of terms for purposes of § 455. Clause (d)(4) gives an elaborate definition of financial interest. This provision is interesting because it not only defines what will be regarded as a financial interest but **excludes** certain types of interests from the definition. For example, subclause (d)(4)(i) states that “Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund”. Clause (b)(4) treats financial interests in a way that is substantially similar to, if not necessarily identical to, the way they would be treated under Canadian law but it gives much greater clarity and specific guidance than one would find in Canadian law.

Clause (b)(5) deals with the judge’s family members and provides for disqualification where one of these individuals is a party, is acting as a lawyer in the proceeding, “is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding” and is “to the judge’s knowledge likely to be a material witness in the proceeding”. Once again, Canadian practice concerning judicial disqualification on the basis of family relationship would produce substantially similar if not identical results to this provision.

Finally, subsections (e) and (f) explicitly address the issue of waiver by the parties. Waiver is not permitted in relation to the grounds of disqualification enumerated in § 455(b), but it is allowed where disqualification arises under the more general provisions of § 455(a) “provided it is preceded by full disclosure on the record of the basis for disqualification”.

While the ABA Model Code of Judicial Conduct represents the dominant model for state laws governing judicial disqualification, there is considerable variation in matters of detail even among states that do not depart from the Model Code by including a peremptory disqualification provision. To take just one example, § 170.1(2)(B) of the California Code of Civil Procedure adopts a disqualification rule that is similar to Canadian practice in relation to the judge’s former colleagues in legal practice and former clients. After partially adopting the ABA Model by indicating in clause 2(A) that a judge is disqualified if he or she “served as lawyer in the proceeding ...”, clause 2(B) states:

(B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

1. A party to the proceeding or an officer, director, or trustee of a party was a client the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.
2. A lawyer in the proceeding was associated in the private practice of law.

This provision creates a presumptive rule of disqualification from adjudication of cases involving former colleagues or personal or law firm clients during a two year “cooling off period”, while leaving in place a longer period of disqualification if the judge was personally involved as a lawyer in some aspect of the present proceeding.[[36]](#footnote-36)

American law governing the procedure for judicial disqualification varies from jurisdiction to jurisdiction.[[37]](#footnote-37) In many instances judges will recuse of their own motion, especially if it is evident that they fall within one of the enumerated grounds upon which disqualification is required. Some American jurisdictions have specific rules governing the procedures to be used by a party who seeks the disqualification of a judge who does not recuse voluntarily, and in other jurisdictions the ordinary rules governing motion practice apply.[[38]](#footnote-38) Typically the judge whose disqualification is sought decides the motion, and in some jurisdictions the challenged judge has an affirmative obligation to do so.[[39]](#footnote-39) In other jurisdictions the judge whose disqualification is sought has the discretion to transfer the decision to another judge, but this is not a common practice.[[40]](#footnote-40) There are some jurisdictions where a judge who receives a motion seeking his or her recusal has the option of deciding to recuse, but if that option is not taken, the decision on whether or not the judge is disqualified must be referred to be taken by another judge.[[41]](#footnote-41)

1. **Overview of the German Law of Judicial Disqualification**

As is the case in Canada, the guarantee of impartial adjudication in Germany is thought to have constitutional dimensions. However, the Basic Law does not expressly grant a specific right to an impartial tribunal. The jurisprudence anchors the right in two sections of the Basic Law: the constitutional right to unbiased adjudication is derived from the general principle of the rule of law (Rechtsstaatsprinzip) as articulated in Art. 20,[[42]](#footnote-42) and the right to a lawful judge in accordance with Art. 101 of the Basic Law.[[43]](#footnote-43) This clause introduces the notion of a lawful judge (gesetzlicher Richter).[[44]](#footnote-44) At its core, this latter right is somewhat analogous to the right to trial by one’s peers in the sense that it protects against secret, *ad hoc* or otherwise unchecked appointments of tribunals for specific purposes. In Canadian terms, it seems to be most closely related to the right of access to a court of inherent jurisdiction.

In the jurisprudence of the German Constitutional Court, the right to a lawful judge has been amplified to give content to the notion that lawfulness includes impartiality. The right to one’s lawful judge is considered to be both a positive and a negative right, however. It supports the negative right to not be subject to adjudication by a judge who could be objectively said to be tainted by bias, but also the positive right to be heard by the assigned judge, absent a well-founded bias concern. Judicial independence is separately guaranteed in Art. 97.[[45]](#footnote-45) In criminal cases, courts have also resorted to the right to free choice of counsel in some recusal situations.[[46]](#footnote-46)

German federal law codifies judicial disqualification in the various rules of court, found in the courts’ enabling statutes. The constitutional, criminal and civil courts have structurally similar rules, but categories of automatic disqualification are tailored to the jurisdictional subject matter of the respective courts. Also, as the time of enactment varies, so does the actual wording. Various administrative courts of specialized jurisdiction incorporate the civil code model by reference.[[47]](#footnote-47)

The law of disqualification proceeds in two parts. First, it sets out situations that automatically disqualify a judge from hearing a case. Second, the statute provides for recusal motions by a litigant or the judge where a fear of bias exists or a judge attempts to sit in a situation of automatic disqualification. In the case of the Constitutional Court, the statute additionally narrows the categories of automatic disqualification by excluding certain subcategories from the application of the more general principles.

Statutes also provide for procedural issues including who decides the issue, waiver, replacement procedures and appellate remedies. These are potentially of significant interest to Canadian courts who have typically developed their recusal procedure *ad hoc*.

Compared to its Canadian counterpart, German law favours a duty to sit, both substantively in situations where a Canadian judge would likely recuse and procedurally, by ensuring that judges are not able to bow out unnecessarily. At the same time, by providing for grounds of automatic disqualification, the statutes introduce bright line rules for some high-frequency situations.

An area of divergence between Germany and Canada is how lay adjudicator bias is treated in criminal cases. In Canada, the law and procedure for jury bias is completely separate from judicial disqualification. This is not the case in Germany. The standards applied to lay adjudicators are the same as the standards applied to judges. This closer analogy is apt because lay adjudicators, while functionally somewhat equivalent to jurors, are not appointed *ad hoc*, but serve for a number of years, receive training and are required to swear an oath of office.

1. Automatic Disqualification

While there is some variation in language, criminal, civil and constitutional courts all contemplate automatic disqualification for substantially the same reasons:

a) involvement by the judge or a close family member in the litigation as a litigant or witness, or in the case of criminal courts, as victim;

b) prior professional involvement in the matter as counsel or police officer; and

c) prior judicial involvement.

In all cases, a close family member is defined as related by blood to the third degree or by marriage to the second degree. Despite these commonalities, there are important differences between the courts, particularly as they relate to the first and third categories. As regards the first category, personal involvement, the Constitutional Court Act excludes family status, occupation, ethnic origin, political party membership and analogous grounds as constituting personal involvement.

As regards the third category, in criminal courts, the part of the criminal procedure rules dealing with recusal would not appear to bar the participation of a trial judge in a new trial, merely in the (appellate) decision to order a new trial. However, remittal to the trial judge following a successful appeal is precluded by StPO Art. 354 (2), which requires a different chamber of the lower court to hear the new trial. Thus, unlike in Canada, it is not open to the appellate court to remit a matter to the trial judge for determination in light of the appellate decision.[[48]](#footnote-48) This represents a different weighing of two competing objectives: avoiding a closed mind is preferred in the German context while in the Canadian context, efficiency and judicial resource management tip the balance in favour of a power to remit.

In civil courts, there are three grounds related to prior judicial involvement that give rise to automatic disqualification: (a) prior involvement in the final adjudication of a matter; (b) prior involvement in a matter in which undue delay is alleged; and (c) prior judicial involvement in mediation or other alternative dispute resolution measures related to a particular matter.

In an interesting variation on the theme, the Constitutional Court Act also disqualifies judges who have had prior judicial involvement by reason of their office or profession, but goes on to limit the scope of this qualification in two important ways. First, it excludes prior involvement in the legislative process as constituting disqualifying prior involvement; and second, it excludes the articulation of an academic opinion in relation to a legal question of relevance to the proceeding as a disqualifying ground.

1. Recusal Motions

In all courts, a party may move for the recusal of a judge for two reasons: one, because of a fear of bias; and two, because a judge chose to sit despite the presence of automatic disqualification grounds. The test for a fear of bias is whether, based on a reasoned apprehension of the facts as they are known to it, the objecting party has cause to believe that the judge will adopt an inner stance towards the party that may interfere negatively with his or her impartiality or open mind.[[49]](#footnote-49)

Courts have sought to emphasize that the question of judicial disqualification should be approached from the perspective of the litigant rather than adopting an insider perspective. However, the perspective is that of an idealized litigant rather than the actual person. For example, in the jurisprudence of the Federal Court of Justice (Bundesgerichtshof, the highest court of appeal in non-constitutional matters), the perspective is emphatically that of the moving party,[[50]](#footnote-50) but the Court has made it clear that this subjective viewpoint is really limited to the state of knowledge a party would have, rather than their actual experience of the proceedings in the heat of the moment.[[51]](#footnote-51) This jurisprudence recognizes and seeks to suppress the emotional charge of an apprehended bias for the litigant, but constructs the judge as impassionate.[[52]](#footnote-52)

Generally, the jurisprudence is concerned with situations giving rise to a fear of bias, and in particular, with the relationship between the enumerated grounds of automatic disqualification and arguable analogous grounds that might give rise to a fear of bias.

* + 1. Personal Relationships

One area that gives rise to bias motions in civil courts are personal relationships not covered by the automatic disqualification rules. Taubner suggests a categorization of the case law relating to personal bias into five classes: family relationships, memberships in clubs or corporations, accepting favours, personal relationships with professional litigation participants other than lawyers and personal relationships with lawyers.[[53]](#footnote-53)

Civil courts have found that a broader range of family and personal relationships may give rise to a reasonable apprehension of bias than merely those covered by the automatic disqualification rules. Family relations and other personal relationships warranting recusal include engagement, close friendships, personal hatred, paternity of a child, or having child in common and love affairs. That said, the jurisprudence is clear that, absent additional considerations, in-law siblings, and similar family and social relationships that are not close or not current, and professional encounters (e.g. a builder or tradesperson doing work at the judge's house) do not give rise to a reasonable apprehension of bias. The literature is split on whether the relationship has to be direct or includes relationships with the judge’s spouse.[[54]](#footnote-54)

Memberships in organizations warrant recusal only the club is very small, the judge has a leadership role, and the club is directly involved in litigation. Since judges, like all other citizens, have a constitutional right to be a member of a political party, such membership is never a reason to recuse.

The legislature has taken a slightly different and narrower approach to disqualifying personal relationships in criminal courts. While a criminal court judge is automatically disqualified where the alleged victim is her spouse, the prosecutor’s spouse is not included in the list of automatic disqualification relationships. Some commentators have argued that a judge should not preside over a trial where her spouse is the prosecutor despite the jurisprudence of the Constitutional Court, which would suggest that in the absence of disqualification language, a personal relationship with the prosecutor was not in itself a basis for recusal.[[55]](#footnote-55) However, the legislative choice to permit judges to sit where they have a close personal relationship with the prosecutor is clear and was made even clearer in 2001 when a previous section of the Federal Lawyers Code (“BRAO”), that had previously given courts the discretion to limit the practice of lawyers in a court where their spouse was a judge, was repealed. As in other institutional design choices, there are competing values at stake. The appearance of impartiality from the perspective of the accused will likely be affected when the judge is married to the prosecutor. On the other hand, judge-prosecutor marriages are very commonplace and recusal on that basis would affect a large number of docketing decisions, particularly in small towns.[[56]](#footnote-56) The BGH has recently ruled in a civil context that a relationship at some remove warrants recusal even where there is no evidence that the lawyer spouse and the judge had discussed the file or that the lawyer spouse’s financial interests were significantly affected.[[57]](#footnote-57) In this case, the judge was married to a lawyer who practiced in the same law firm as respondent counsel. Since that decision was grounded in constitutional considerations, it may well be that the criminal court jurisprudence will follow suit.

* + 1. Professional Relationships

One of the areas of judicial disqualification with significant difficulties in Canada is whether and when professional relationships give rise to a reasonable apprehension of bias. This issue arises with frequency because Canadian judges are typically appointed from the practicing bar and tend to have a well-established set of relationships with fellow lawyers at the time of their appointment. This problem arises less frequently in Germany because most judges are appointed as full-time judges immediately following their law studies and a brief period of clerkship, frequently served in courts or in prosecutor’s offices. There are two significant exceptions: a full professor of law is entitled to hold part-time judicial office; and the appointment practice of the Constitutional Court, as discussed below in more detail, routinely sees term-limited appointments from the public law professoriate. It is thus not surprising that some of the most contentious cases regarding recusal in response to professional relationships arise in the Constitutional Court.

The jurisprudence of the Constitutional Court in this regard has a prominent and unusual commentator. In 2000, former Chief Justice Benda, who had led the Court until 1983, published a paper in which he criticized, with some venom, the recusal practice of his former Court. In it, he argues that the Constitutional Court applies too strong a presumption of impartiality, in part out of elitism or arrogance (a judge of the highest court is presumed to be of such high caliber, intellectually and morally, to make bias a virtual impossibility) and in part out of excessive collegial courtesy (noting that both in cases of applications and in cases of self-disclosure, it is the judicial colleagues of the impugned judge who adjudicate the motion).

The critique was occasioned by one of the most controversial recusal decisions of the Court. It involved a federal minister of the interior who had allegedly accepted donations in contravention of the country’s party financing laws. One of the judges of the Constitutional Court gave notice to his judicial colleagues in the Second Chamber of the Constitutional Court that he was a founding partner in a law firm that now, with his consent, included the minister. He noted that his membership in the firm was suspended for the duration of his tenure on the Court by virtue of Article 104 of the Constitutional Court Act. He also advised his colleagues that he no longer participated in the financial revenue and governance decisions of the firm except in fundamental matters of membership. In a split decision, four judges of the Court ruled that there was no reasonable apprehension of bias, since mere membership in a political party was not a cause for recusal and because Justice Jentsch could not be said to have a direct interest in the outcome of the litigation.[[58]](#footnote-58) This was so because Justice Jentsch's membership in the firm was suspended by operation of law during his tenure on the court and despite the fact that the law firm name continued to include both the names of Jentsch and Minister Kanther.

When a related matter came to the Court in 2003, Justice Jentsch again gave notice of a potential apprehension of bias. He repeated his explanation about the membership of Mr. Kanther and his ongoing relationship with the law firm, that also included a concern that the decision of the court could have effects on the not merely legal evaluation of Mr. Kanther's behaviour in relationship to party finances. This time, a unanimous Constitutional Court found that Justice Jentsch's relationship with Mr. Kanther did give rise to a reasonable apprehension of bias and that he should not sit. The Court distinguished its earlier decision on the basis that the prior review had taken place in the context of an abstract judicial review whereas the current case involved a closer connection between the allegations and the personal involvement of Mr. Kanther. Thus, the personal reputation of Mr. Kanther, and by implication, also the personal connection between him and the judge were now squarely in issue. Since an adverse finding of the Court against Mr. Kanther might implicate him in further proceedings, this could affect the interests of the law firm. The Court affirmed the general presumption that a judge of the Constitutional Court would possess the necessary independence and distance to enable him to act impartially and objectively, but noted that the legislative scheme was designed to address what it called the 'evil appearance' (böser Schein) of a possible lack of impartiality. Upon reasonable appreciation of all of the circumstances it therefore concluded that there was sufficient cause to doubt the impartiality of the judge because of his partnership with Mr. Kanther in a law firm.[[59]](#footnote-59)

* + 1. Prior Judicial Involvement

A common source of applications for recusal in criminal cases is communications between the judge or presiding judge and one party. German law does not permit plea bargaining except under the direct supervision of the courts. Preparatory communications by the judge with one side or the other form the basis of complaints that the resulting “deal” has led to a finding of a closed mind on the part of the judge.[[60]](#footnote-60) The federal Parliament has now acted to regulate[[61]](#footnote-61) and the Constitutional Court has held that only communications specifically authorized by the *Act* are permitted, precluding informal arrangements.[[62]](#footnote-62) While the problem is tied to the peculiarities of the German procedural law, the solution might have application in Canada. High frequency bias problems may be subject to legislative bright line solutions. This would support arguments made elsewhere on, for example, breach hearings.[[63]](#footnote-63)

* + 1. Expression of Views in a Judicial Capacity

A difficult area in civil cases is the question how much assistance a judge may provide to an (unrepresented) litigant before crossing the line into apparent partiality. The Code of Civil Procedure was amended in 2004 to require judges to play a more active case management role. This also means that they now provide more assistance to parties than previously thought appropriate in the previously strictly adversarial system of civil justice in Germany. Sticken argues that the novel obligations on judges to explain, inform and prevent surprises may all operate to threaten judicial neutrality.[[64]](#footnote-64) Four situations are thought to give rise to concerns:

1) the judge directs a change in the pleadings;

2) the judge advises a party of an impending limitation period;

3) a possible obligation to explain the evaluation of evidence prior to rendering judgment; and

4) does the fact that a party is or is not represented make a difference to the judicial obligation to advise?

Sticken argues that neutrality requires that the judge not pursue 'purposes' of his or her own as the adversarial nature of the proceedings is a necessary guarantor of impartiality. However, he accepts that promoting settlement does not undermine the impartiality of the judicial officer.[[65]](#footnote-65) Further, he comes to the conclusion that the scope of the legislative change is modest and consistent with impartiality requirements. In his view, the new provisions do not require a judge to direct changes in pleadings or notify parties of a limitation period. This issue has also surfaced in the United States[[66]](#footnote-66) and, more recently, in Canada.[[67]](#footnote-67)

On the other side of the coin, a complex question is whether hostility between a judge and counsel is a reason to recuse. The jurisprudence consistently holds that the hostility must spill over into hostility against the party as well as the lawyer and the expression of such hostility must occur in the proceeding where recusal is sought.

* + 1. Expression of Views in an Extra-judicial Capacity

Because of the peculiarity of the Constitutional Court Act, viz. the statutory creation of exceptions to situations of automatic disqualification, the relationship between cases of automatic disqualification and those warranting recusal on a case-by-case basis tends to be framed in terms of whether the statutory exceptions to Art. 18 create a bar to finding a reasonable apprehension of bias. Several of these exceptions relate to the expression of views in an extra-judicial capacity. For example, given the express terms of Art. 18, direct involvement in the legislative process does not disqualify a judge. Could advice given by a judge to government in a professional capacity ever give rise to a reasonable apprehension of bias? The current jurisprudence of both chambers of the Constitutional Court uses a “without more” test. Under this approach, the mere fact that a judge has previously come into contact with or has articulated views on a matter is never sufficient, without more, to justify disqualification. The rules of when certain additional facts are sufficient to unseat the very strong presumption in favour of a duty to sit are being developed on a case-by-case basis.

Initially, the Constitutional Court sought to solve this problem by adopting an extremely robust standard based on largely procedural reasoning.[[68]](#footnote-68) The first case was a challenge to Justice Geiger in 1951. The context of the case was a challenge to the redrawing of provincial boundaries. Geiger had provided government with a legal opinion in regards to the proposed change. The reasoning in the Court’s decision was minimal. The statute requires the judge to take a position on the bias allegation, but the other judges decide the issue. Geiger himself declared that he was not biased. This, taken together with the fact that providing an opinion constituted less involvement than direct participation in the legislative process, which is specifically excluded from the automatic disqualification scheme of Art. 18, led the Court to conclude that there was no bias issue. The decision was criticized because the exception regarding involvement in the legislative process is located in article 18, while the application process in this case was to be governed by Art. 19. Reading the exceptions in Art. 18 into Art. 19 appears to suggest that no application can succeed where automatic exclusion under Art. 18 is not warranted. Lovens points out that this is a strained interpretation.[[69]](#footnote-69) That said, the result was likely correct.

Another statutory exception to automatic disqualification relates to the expression of views that might otherwise be thought to indicate a bias in academic writing. This issue is peculiar to the German context. The public law professoriate has been a primary recruitment ground for judges on the Constitutional Court. Leading constitutional scholars make up the vast majority of appointees. Since appointments are presently subject to a non-renewable twelve-year term,[[70]](#footnote-70) it is quite possible that the professorial appointment may bracket the judicial one. While judges do not teach during their judicial tenure, they frequently continue to participate in academic life including presenting at conferences. As a result, it is very common that judges would comment on any number of constitutional issues, many of which might come before the court during their tenure there.

Interestingly, the exception for academic writing is itself the result of a recusal decision by the Constitutional Court. In the 1966 Leibholz decision, the Court’s approach was considerably more probing compared to the Geiger case. The case involved a challenge to legislation that established state-sponsored party financing. Leibholz was a professor of law at Göttingen and Bruge; he was a judge of considerable experience who had served on the Constitutional Court for 15 years. Between the oral hearing and the release of the judgment, he presented a paper at a constitutional law conference where he indicated a preference for state party financing. Upon application by two fringe parties, the Court decided to disqualify Leibholz. In its decision, the Court indicated that the issue was not actual partiality but a "concern about partiality" (Besorgnis der Befangenheit). It stated that the test was whether a person without involvement in the process who, in a reasonable manner appreciating the entire context, would have cause to doubt the impartiality and objective stance of the judge. (BVerfGE 20, 26) The Legislature disagreed with the conclusion of the Court and responded to the ruling by adding an academic writing exception into Art. 18.

1. Procedural Provisions

The third element common to all three statutory schemes is a set of procedural provisions addressing limitation periods/waiver, directing parties how to bring recusal motions, determining who hears the motion, and delineating appeal and self-disqualification processes.

Generally, an application for recusal must be brought early in the proceeding. In civil court, the motion must be brought before the moving party makes its first appearance; in the constitutional court prior to the oral hearing on the merits; and in criminal court, prior to the examination of the first defence witness. Early motions are facilitated by permitting a request for a naming of the judges and lay adjudicators prior to trial.[[71]](#footnote-71) Standing is extended to victims who appear as a party to the proceeding as a private accessory prosecutor (“Nebenkläger”).[[72]](#footnote-72) In each case, these limitation periods are subject to discoverability.

The application must be brought in the court seized of the matter and is typically heard by a panel of that court, in most circumstances excluding the judge in relation to whom the application is brought. This is also true in circumstances where the judge formally identifies a reason that might give rise to a reasonable apprehension of bias. A notable exception to this latter rule can be found in the criminal rules of procedure. The trial judge him or herself may determine whether the application is timely and, if appropriate, dismiss it for that reason. A panel not including the trial judge decides all other recusal motions, and dismissing the motion on the basis of a finding that it was brought for purely tactical reasons has to be made by a unanimous panel, again excluding the trial judge. The decision to disqualify or recuse is not subject to appeal, but an unsuccessful recusal motion may be appealed as part of an appeal on the merits.

1. **Potential Rule-Based Solutions for Disqualification Issues in Common Law Jurisdictions**

As we discussed above, both American and German statutory rules for judicial disqualification share with common law jurisdictions such as Canada and the United Kingdom the general feature of disqualification that judges should not hear cases in which their impartiality can reasonably be called into question. The challenge for all these jurisdictions, therefore, is to define with greater precision which types of challenges to a judge’s impartiality the law will regard as “reasonable” and therefore acceptable, and correspondingly which types of challenges will not be regarded as acceptable. Despite the admonition by common law courts that the application of the “reasonable apprehension of bias” test is fact and context specific, common law decisions have been successful at identifying a range of limitations on the types of challenges to a judge’s impartiality that are likely to succeed. Indeed, the English Court of Appeal’s decision in the *Locabail* case is best understood as a self-conscious effort on the part of the court to re-assert the boundaries for successful challenges to the perception of judicial impartiality in the wake of the House of Lords decision in *Pinochet*.[[73]](#footnote-73) Statutory jurisdictions such as Germany and the United States go beyond articulating a statutory standard of reasonable bias to make rules about situations that to do and do not warrant recusal. Our argument in this part of the paper is that there would be merit in using rules rather than common law decisions to establish the boundaries for successful challenges to judicial impartiality in a number of areas.

In our view, there are several reasons to believe that rules will be helpful in supplementing the common law “reasonable apprehension of bias” test. The first is that, as our research suggests, decisional law typically under-represents the instances in which judges are recusing themselves, so the case law is likely to give at best a partial view of existing judicial practice. Secondly, there is reason to believe that informal practices concerning recusal are not particularly well understood by many members of the judiciary, with the result that they are likely to be applied inconsistently. This can cause unnecessary redistribution of workload among judges and potentially unnecessary delay to parties that might be alleviated if a formal set of standards were articulated in the form of a rule. Third, reliance on ill-understood and inconsistently applied informal understandings of when it is and is not appropriate for a judge to recuse in marginal situations can cause difficulty for parties and their counsel. The existence of clearer rules governing when a judge is or is not disqualified may prevent the waste of time advancing arguments that a judge should recuse in situations in which the application has no chance of success, and at the same time increase the confidence of parties and counsel in advancing valid objections to the judge’s participation. Fourth, there are, at least in some circumstances, compelling reasons to create procedural rules that give judges the explicit authority to refer the decision about whether or not disqualification is required to another judge. Fifth, there are circumstances in which the considerations of efficiency or other requirements of our system of adjudication enable judges to sit notwithstanding what appears to be an objective basis for arguing that the judge is pre-disposed in one manner or other. One example is the situations where arguments are raised that a judge’s advocacy activity or writings prior to judicial appointment are indicative of partiality.[[74]](#footnote-74) In at least some of these situations it may be helpful for a judge to be able to point to a rule authorizing him or her to sit, rather than to have to explain to an objecting party that there is no reasonable basis for perceiving that the judge is anything but impartial. Finally, there are some situations in which it may be useful to establish a bright-line standard for when disqualification is required, since the choice of any particular place to draw the line is somewhat arbitrary. Requiring individual judges to guess where that line ought to be drawn on the basis of little or no information places them in a difficult if not impossible situation. The best example of this type of situation is the “cooling off” period for judges to hear cases involving being argued by members of their former law firm or involving their former clients. As we will suggest in more detail below, there are good reasons for thinking that a “cooling off” period is desirable but it is not obvious what the appropriate length of that “cooling off” period ought to be, and a formal rule is both a more effective and a more transparent way of making that determination than an informal local practice.

As indicated at the outset of the paper, we believe that there are three substantive areas and one procedural area in which rules would be particularly well suited for giving guidance on judicial disqualification. They are: (1) professional relationships between justice personnel and litigation participants; (2) prior judicial consideration in the cause or related litigation; (3) extra-judicial writings suggesting a predisposition; and (4) procedural rules regarding who should decide recusal motions. We will address each in turn.

1. Professional Relationships with Former Colleagues and Clients

Since all Canadian judges were once lawyers,[[75]](#footnote-75) it is normal that they will have professional relationships with former colleagues from their law firm and former clients. Some of these relationships may be sufficiently close that a judge would never feel comfortable hearing a case being argued by a former colleague who is a close personal friend or involving a client with who the judge worked closely for a number of years in his or her capacity as a lawyer. In addition, the Canadian jurisprudence strongly supports the view that if a judge was personally involved in a matter during his or her career as lawyer, the judge should not sit on a case that involves that matter.[[76]](#footnote-76) This is not an ironclad rule since the Supreme Court of Canada has concluded that if the matter was sufficiently far in the past and the judge’s involvement was sufficiently tangential that he or she has no recollection of it, it can be permissible for the judge to sit.[[77]](#footnote-77) As noted above, in situations where the professional relationship with a former colleague or client is not one that places the judge in a conflict of interest because the judge was personally involved with the matter in dispute or the firm was involved in the dispute while the judge was still a member of the firm or because of a close personal relationship, the advice given to Canadian judges is that the judge should adopt a “'cooling off' period, often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge . . .”. [[78]](#footnote-78)

As we noted earlier, the problem with a “cooling off” period established by local tradition is that the tradition may not be passed on effectively to judges, and it is even less likely that counsel and unrepresented litigants will be aware of the tradition. The fact that local tradition is variously described as setting the cooling off period at 2, 3 or 5 years suggests that the choice of any particular time frame is less important than the fact that there be a shared understanding of what the time frame is, and this in our view lends itself to being established through a rule.

Neither the American federal nor the German disqualification rules provide for cooling off periods. While German disqualification rules are absolute with respect to adjudicating matters where they have acted as counsel, they are silent on whether recusal is necessary if a former client or colleague appears before them on an unrelated matter. For example, criminal court judges are disqualified if they have "acted in the case as an official of the public prosecution office, as a police officer, as attorney of the aggrieved person or as defence counsel." (*supra*). Similarly, a civil court judge is barred in "all matters in which he was appointed as attorney of record or as a person providing assistance to a party, or in which he is or was authorised to make an appearance as a legal representative of a party”. By implication through omission, German judges are not barred from hearing cases brought by, against or involving a former client in an unrelated matter at any time. As is clearly apparent from our discussion of the jurisprudence of the Constitutional Court, the mere fact that a German judge had a prior association with a law firm that is now representing a client before the judge is not, without more, reason for recusal. Instead, there must be a financial interest in the outcome of the litigation. As American federal practice does not explicitly disqualify judges for hearing cases involving former clients as distinct from hearing cases in which they were personally involved in a non-judicial capacity, these jurisdictions offer somewhat limited guidance as to the precise content of a rule governing “cooling off” periods.[[79]](#footnote-79) Similarly, American federal rules governing disqualification because of a judge’s association with a lawyer with whom the judge previously practiced refer only to situations in which the “lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . .”. [[80]](#footnote-80) On the other hand, the provisions of § 170.1(2)(B) of the California Code of Civil Procedure offer a model for a two year “cooling off” period that could be adopted by rule in Canada or in other common law jurisdictions.

1. Prior Judicial Involvement with Litigants

One of the areas of recusal law described by judges as raising most difficult issues is what is sometimes described as the repeat customer phenomenon. For purposes of Canadian law, two situations need to be distinguished: unrelated prior litigation, and related litigation or interlocutory matters in the same litigation.

In none of the jurisdictions under consideration is the mere fact that that the judge has encountered one of the litigants in the course of presiding over another unrelated matter a basis for disqualification. Canadian case law suggests that greater care must be taken where a judge has made an adverse credibility finding against a party in a previous case, but even in these circumstances disqualification is not required in all cases. Rather, the issue is whether the findings were expressed in sufficiently strong terms that a reasonable person would doubt the ability of the judge to adjudicate the present cases fairly upon the evidence adduced before him or her in a subsequent unrelated proceeding.

The second situation is previous encounters with litigants in related litigation or other stages of the same litigation. Again, it is common ground between the jurisdictions under consideration that the mere fact that a judge was involved in some prior stage of the proceeding does not give rise to a reasonable apprehension of bias. Examples include breach hearings following sentencing with conditions, bail hearings followed by the trial on the merits, preliminary motions, *voir dire* rulings, and case managed litigation.

In Canada, the jurisprudence establishes that a judge may sit even if the judge found against a party in a prior unrelated proceeding or on an interlocutory issue. In our view, the basic rule that without more, a prior encounter between judge and litigant does not warrant recusal could easily be codified. Its extension, that an adverse ruling in an interlocutory issue also does not warrant recusal may be more problematic. This is because the manner in which the adverse ruling is expressed influences the recusal analysis. Whether any judicial commentary strays into the forbidden zone is too contextual and nuanced to be readily captured in a bright line rule.

As regards prior judicial dealings in the same or related proceedings, there are at least three distinct problems that arise with some frequency. The first is the perception of the litigant, particularly one who is self-represented, that any prior finding of a judge vis-à-vis that litigant is prejudicial in terms of the ultimate outcome of the litigation. The second is the concern that evidence that does not form part of the record will contaminate the proceeding. The third is that remarks made by the judge in the context of fact findings or characterizations of the argument advanced by counsel or the litigant are seen as prejudging the matter. Particularly the first concern is susceptible to bright line rule making.

Efficient use of judicial resources generally suggests that a judge who is already familiar with the matter should be the judge dealing with it in its entirety. Additionally, the risk for inconsistent fact findings is reduced if only one judge remains seized of the matter. These reasons are sufficiently important that the feelings of the litigants will usually have to give way to them. Thus, the question is rarely whether a judge should recuse merely because they have been involved in the matter before, but how to best communicate to the litigant that despite their misgivings, the proper administration of justice demands that the judge continue to sit. One of the advantages of a rule-based approach is that the judge can point to the rule in explaining to the litigant, particularly the self-represented litigant, that recusal is not appropriate.

In all three jurisdictions we have examined, the sole blanket exception to the general rule that a judge may sit in cases despite prior judicial involvement is the participation of a judge in an appellate consideration of his or her own decision. In the German context, the specific mention of this exception makes clear that other forms of prior judicial involvement do not attract disqualification. The equivalent limitation is also codified at the federal level in the United States,[[81]](#footnote-81) and in a number of Canadian jurisdictions.[[82]](#footnote-82) Nevertheless, the leading United States Supreme Court decision on the question of whether prior judicial involvement in a case, *Liteky v. United States*,[[83]](#footnote-83) does not rely on this fact as a reason for permitting judges to sit in cases of prior judicial involvement other than one's own appeal, and we are not aware of any Canadian case that relies on comparable Canadian statutes in support of this proposition. This may suggest that the place of codification is important for its interpretation. In Germany, the bar against considering one's own decision at the appellate level is included in the general rules surrounding disqualification. In Canada, the same rules are dispersed through, *inter alia*, various enabling statutes establishing appellate courts, Rules of Court and the Criminal Code. In the case of the Criminal Code, we find clear language addressing the question of whether a case management judge may hear the trial on the merits. Section 551.1 provides that "The appointment of a judge as the case management judge does not prevent him or her from becoming the judge who hears the evidence on the merits", while s. 551.4 provides for the procedure to be applied when the case management judge is also the trial judge. This recent (2011) amendment to the Code is a good example of how Canadian statute law already includes some rules that clarify the circumstances when a judge does not need to recuse. Similarly, the rules of the Family Court in British Columbia make it clear that the case management judge may remain seized further applications in the cause, but preclude the settlement conference judge from presiding over the trial.[[84]](#footnote-84)

1. Extra-judicial Writings

Canadian courts have generally been reluctant to disqualify judges simply because of their extra-judicial writings, be they related to advocacy, advice to government, political activity or academic contributions. A prominent example of this fact is the decision of Justice Bastarache in the Supreme Court of Canada in Arsenault-Cameron. The case involved minority language rights and as an academic, Prof. Bastarache had written extensively on the issue. He was also counsel for minority language rights groups prior to his appointment to the bench. When the Prince Edward Island case came to the Supreme Court, counsel for the Province brought a motion for his recusal. The Court took the opportunity to clarify the procedure appropriate for recusal and denied the motion. The decision is not only in line with Canadian jurisprudence, but also with the practice of comparator courts of last resort. Despite that, it is not difficult to see why counsel might be concerned. Again then, as in the situation of the self-represented litigant re- encountering a judge, the issue is not so much whether recusal is appropriate but how to communicate that the judge should continue to sit. One of the animating reasons for adopting a reasonable apprehension of bias test in preference over requiring proof of actual bias is that both the presence and the absence of an open mind are difficult to prove. There is a reason why the issue arises most commonly in appellate and constitutional courts. These courts have tended to recruit more routinely from the professoriate than trial courts, although recent Canadian experience seems to suggest an increased trend to appoint law professors to provincial courts.

In all of these cases then, there is a reason to consider whether bright line rules might be better suited to promote confidence in the justice system, give comfort to litigants, or at least avoid unnecessary and ultimately unsuccessful recusal motions. Inspiration might be taken from the German Constitutional Court, despite the fact that the institutional practices of that court is greatly at variance from the Canadian situation. As discussed above, judges are appointed to the court for a single tenure of 12 years, they overwhelmingly come from the legal academy, and they routinely continue to participate in academic conferences and publications throughout their judicial tenure. Given that institutional design, it is foreseeable that the situation in *Arsenault-Cameron* would occur with much higher frequency in that court absent a statutory rule to the contrary. The Constitutional Court Act therefore usefully provides that neither advice to government, involvement in the drafting process of legislation nor academic writing gives rise to a reasonable apprehension of bias.

1. Procedural Rules

In most parts of Canada, there is no special procedure by which parties may seek the disqualification of a judge.[[85]](#footnote-85) It is common for judges to recuse themselves of their own motion if they believe that they are disqualified, and our research suggests that this is the most common procedural context in which recusal decisions are made.[[86]](#footnote-86) If a party wishes to seek a judge’s recusal, the normal practice is for a party to make a motion using the ordinary rules of motion practice.[[87]](#footnote-87) It is also relatively common for judges who are unsure about whether or not they should recuse because of certain circumstances to seek submissions from the parties about whether or not the judge should recuse.[[88]](#footnote-88) While this procedure works tolerably well, it does present certain difficulties that could be addressed through the use of procedural rules.

The first concerns the fact that the judge whose impartiality is being questioned makes the decision about whether or not he or she is disqualified. There are a number of practical reasons why it may be desirable in some circumstances to have the judge whose disqualification at issue make the determination, at least at first instance. One is that the judge is in the best position to know subjectively if there is a real basis for concern about his or her ability to decide impartially, and in those situations the judge ought to be in a position to decide that it is inappropriate for him or her to sit.[[89]](#footnote-89) A second reason is that automatically referring the matter to another judge might encourage parties to make unmeritorious applications for tactical reasons, for example to create delay. A third is that there are situations in which the basis for disqualification arises unexpectedly, for example if a judge recognizes a social relationship with a witness when the witness first appears in court partway through lengthy hearing. Referral in these circumstances may cause delay that is not in the best interests of either party. It is interesting to note that prior to 2002, ss. 238-41 of the Quebec *Code of Civil Procedure* required applications for recusal to be heard by a different judge than the judge whose recusal was being sought, but when the Quebec National Assembly amended the rules governing recusal in 2002 it established a procedural regime in which motions for recusal are heard by the judge seized of the case.[[90]](#footnote-90)

At the same time, many commentators,[[91]](#footnote-91) including some judges,[[92]](#footnote-92) have noted the awkwardness of asking the judge whose impartiality is called into question to adjudicate this dispute. This awkwardness is particularly apparent where the challenge to the judge’s impartiality is based on things the judge has said or done, either during the course of the hearing or outside of it, that give rise to a concern on the part of a party that the judge is not capable of deciding the case impartially. In our view, it would be helpful to give judges the explicit authority to refer the matter to another judge, especially in such circumstances. We are mindful of the advantages of regimes that require all recusal motions to be heard by someone other than the judge whose recusal is sought, at least if the judge does not recuse right away on receiving the motion, but it seems to us that in most situations the reasons described above of having the judge whose recusal is sought make the determination are persuasive. It seems to us that giving the judge who is the subject of the recusal application the discretion to refer the matter to another judge should be sufficient to capture those instances where the interests of justice would be better served by having another judge make the decision.

The other procedural issue that has raised some difficulties in Canada is the question of who makes the decision on an application to disqualify one member of a multi-member panel. While there has been some unevenness in Canadian practice over time,[[93]](#footnote-93) the current view is that the judge whose recusal is sought makes the decision.[[94]](#footnote-94) The more difficult question is whether this decision is subject to review by the other members of the panel, and if not, what steps the other members of the panel should take if they disagree with the other judge’s decision not to recuse. In *SOS-Save Our St. Clair Inc. v. Toronto (City)*,[[95]](#footnote-95) the majority of the panel decided that, based on their concerns regarding the decision of the third member of the panel not to recuse himself, they would withdraw, thereby requiring the constitution of a new panel to hear the matter in dispute. While this type of unfortunate situation is unlikely to arise that often, it seems to us that it would be preferable to have procedural rules that would give both judges and parties guidance on how to address recusal applications when dealing with multi-member panels.

One possibility would be to maintain the current practice that would requires the judge whose recusal is being sought to make the decision, but add a right of review of that decision by the other members of the panel. A second possibility, which would be our preferred option, is to make a rule that the recusal of any panel member must be addressed by the entire panel.[[96]](#footnote-96) A third possibility would be to adopt the German practice of having all of the members of the panel except the judge whose recusal is being sought hear the motion.[[97]](#footnote-97) We prefer the option of a rule that the whole panel hears the matter because it enables the parties to have the benefit of the views of the entire panel on what is, in essence, a legal question. Presumably if the judge in question is uncomfortable about being involved in the decision it would be open to him or her to recuse on the motion and let the other members of the panel decide, but as we have suggested above, in most situations there are reasons why it is appropriate that the judge whose recusal is being sought have an opportunity to participate in the decision, even if that judge does not have the final say in the matter.

**Conclusion**

There are good reasons why the “reasonable apprehension of bias” test is context-specific and why it may not be possible to supplant it completely with a comprehensive set of rules governing judicial disqualification. Nevertheless, in our view there are situations where it would be productive to employ rules to clarify some marginal situations in which it is difficult to determine when it is, and is not, appropriate for judges to sit. We have identified a number of issues where we think rules would be of benefit to judges and the parties appearing before them: (a) professional relationships with former colleagues and clients; (b) prior judicial involvement with litigants; (c) extra-judicial writings; and (d) procedure governing motions for recusal. We do not exclude the possibility that there may be other areas in which rules would be helpful, but it seems to us that in an area where constitutional considerations lie very close to the surface it may be appropriate to begin with a relatively conservative approach to the use of rules to clarify the boundaries of judicial disqualification.

1. *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.,* [2000] QB 451 at 480. [↑](#footnote-ref-1)
2. *Man O’War Station Ltd. v. Auckland City Council (Judgment No. 1)*, [2002] 3 NZLR 577, [2002] UKPC 28, at para 11.

 [↑](#footnote-ref-2)
3. *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 at para 77. [↑](#footnote-ref-3)
4. Philip Bryden and Jula Hughes, “The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification” (“Tip of the Iceberg”) (2011), 48 *Alta. L. Rev.* 569. [↑](#footnote-ref-4)
5. See, for example, 28 U.S.C. § 455(a), which reads: “Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned” and Texas Rules of Practice 18b(2)(a), which states: “A judge shall recuse himself in any proceeding in which: (a) his impartiality might reasonably be questioned”. [↑](#footnote-ref-5)
6. Philip Bryden, "Legal Principles Governing the Disqualification of Judges" ("Legal Principles") (2003) 82 Can Bar Rev 555 at 596. [↑](#footnote-ref-6)
7. Bryden and Hughes, “Tip of the Iceberg”, *supra* note 4, at 574. [↑](#footnote-ref-7)
8. *Ibid.* [↑](#footnote-ref-8)
9. *Ibid.* at 573. [↑](#footnote-ref-9)
10. *Ibid.* at 572-73. [↑](#footnote-ref-10)
11. *Ibid.* at 571. [↑](#footnote-ref-11)
12. *Ibid.* at 576-77. [↑](#footnote-ref-12)
13. John Leubsdorf, “Theories of Judging and Judge Disqualification” (1987) 62 *N.Y.U.L.R*. 237 at 244-45. [↑](#footnote-ref-13)
14. Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) (“*Ethical Principles*”) at Commentary E19(c), p. 52. [↑](#footnote-ref-14)
15. Bryden and Hughes, “Tip of the Iceberg”, *supra* note 4, at 601-03. [↑](#footnote-ref-15)
16. *Ibid.* at 603, note 51. [↑](#footnote-ref-16)
17. *Ibid.* at 579-80. [↑](#footnote-ref-17)
18. *Ibid.* at pp. 605-08. [↑](#footnote-ref-18)
19. For example, it was evident that judges who sat primarily in smaller centres were much more reluctant to recuse themselves because of professional relationships they had with other lawyers while they were in practice than judges who sat mainly in larger urban centres. We hypothesized that this was probably because judges in smaller communities were likely to know every lawyer in town, and if they disqualified themselves because of their relationship with particular lawyers this could cause significant inconvenience for members of the public who wished to be represented by those lawyers. In larger urban centres this was much less likely to be the case because it would be easier to shift a case to a different judge to avoid hearing a case involving a lawyer where there was even the potential of a conflict of interest. The distinction between the views of judges who sit predominantly in small centres as opposed to major urban centres was much less pronounced in respect of recusal scenarios based on personal as opposed to professional relationships, and largely disappeared with respect to recusal scenarios involving prior judicial knowledge of the parties to a proceeding. See “Tip of the Iceberg”, *ibid.* at pp. 597-600.

 [↑](#footnote-ref-19)
20. Jula Hughes and Philip Bryden, “Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification" (“Refining the Test”) (2013) 36 *Dal. L. J.* 171. [↑](#footnote-ref-20)
21. *Ibid.* at pp. 174-76. [↑](#footnote-ref-21)
22. In a fascinating study, James Gibson and Gregory Caldeira used a national survey of 1,092 Americans to explore the effects of campaign financing on their perceptions of judicial impartiality. They presented the survey respondents with a vignette drawn from the fact pattern in the U.S. Supreme Court’s decision in *Caperton v. A.T. Massey Coal Co.* (2009) 129 S.Ct. 2252 (U.S.S.C.). They varied the basic fact pattern in a variety or ways to determine whether, and if so to what extent, the respondents’ perceptions of the judge’s impartiality, and their overall perception of the impartiality of the justice system. Variations included such things as whether or not the judge accepted a campaign contribution, the extent to which the contribution influenced the judge’s electoral success, whether or not the judge recused, and whether or not the judge’s vote influenced the outcome of the case in favour of the campaign contributor. J. Gibson and G. Caldeira, “Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey” (2013) 10 *Journal of Empirical legal Studies* 76. One of their key findings was: “. . . that recusals can do something to rescue the fairness of courts, but that recusal alone is insufficient to repair the damage created by a contributions-based perceived conflict of interest. Perhaps no one really expects that recusal is a perfect palliative for conflicts but now we have national evidence of the limits of that practice. We observe, however, that this experiment also discovers that recusal might succeed in boosting perceptions of fairness and impartiality to at least a marginally acceptable level.” *Ibid.* at 96. [↑](#footnote-ref-22)
23. In Canada, this is made explicit for criminal trials in section 11(d) of the Canadian Charter of Rights and Freedoms, which reads: “Any person charged with an offence has the right … (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” The constitutional standard for judicial impartiality is the same as the common law “reasonable apprehension of bias” standard (see *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 31) and is linked to broader concepts of judicial independence (see *Reference re: Remuneration of the Judges of the Provincial Court of P.E.I.*, [1997] 3 S.C.R. 3 at paras. 111-13) and fundamental justice (see *Ruffo v. Conseil de la Magistrature*, [1995] 4. S.C.R. 267 at para. 38; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869). In the United States, the constitutional concern for judicial impartiality flows from judicial interpretation of the due process clauses of the Fifth and Fourteenth Amendments. See, for example, *Caperton v. A.T. Massey Coal Co.*, *supra* note 22; *Withrow v. Larkin* (1975) 421 U.S. 35 (U.S.S.C.). [↑](#footnote-ref-23)
24. See *FTC* v. *Cement Institute* (1948), 333 U.S. 683 at p. 702 (U.S.S.C.); (1927), *Tumey* v. *Ohio*, 273 U.S. 510 at p. 502 (U.S.S.C.). [↑](#footnote-ref-24)
25. See *R. v. R.D.S.*, *supra* note 23 at para. 31 and *Reference re: Remuneration of the Judges of the Provincial Court of P.E.I.*, *supra* note 23, at paras. 111-13. [↑](#footnote-ref-25)
26. *Wewaykum Indian Band v Canada* , *supra* note 3 at paras. 66-67; *R. v. R.D.S.*, *ibid.*, at paras. 31-49 (per L’Heureux-Dubé and McLachlin, JJ.) and 111-15 (per Cory, J.). [↑](#footnote-ref-26)
27. Chapter V of Title IV of the Quebec *Code of Civil Procedure*, R.S.Q. c. C-25 (ss. 234-42),sets out rules governing the disqualification of Quebec judges in civil proceedings. These rules are not intended to be exhaustive, with the result that the more general common law rules concerning disqualification apply in that province as well as the rest of the country. See *S.-M. (P.) v. C. (A.J.-L.)* (1993), 101 D.L.R. (4th) 345 at pp. 355-57 (Que. C.A.). [↑](#footnote-ref-27)
28. See *Caperton v. A.T. Massey Coal Co.*, *supra* note 22, and more generally Richard Flamm, *Judicial Disqualification, Recusal and Disqualification of Judges* (“*Judicial Disqualification*”) (2d ed. Berkeley: Banks & Jordan Law Publishing Co., 1997), ch. 1, Richard Flamm, “The History of Judicial Disqualification in America” (2013) 52 *Judges’ Journal* 12.

. [↑](#footnote-ref-28)
29. See *Dimes v. Proprietors of Grand Junction Canal* (1852), 3 H.L.Cas. 759, 10 E.R. 301 (H.L.). [↑](#footnote-ref-29)
30. See *Caperton v. A.T. Massey Coal Co.*, *supra* note 22; Raymond McKoski, “Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard” (“Disqualifying Judges”) (2014) 56 *Arizona L. Rev.* 411 at 431-33. [↑](#footnote-ref-30)
31. See, for example, 28 U.S.C. § 455(a). [↑](#footnote-ref-31)
32. An example of this type of statute is 28 U.S.C. § 455. [↑](#footnote-ref-32)
33. For example, Richard Flamm argues persuasively that 28 U.S.C. § 144, which reads in relevant part “Whenever a party to any proceeding in a district court files a timely and sufficient affidavit that a judge before whom the matter is pending has a personal bias or prejudice either against him or in favour of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding”, was originally intended by Congress to create a peremptory disqualification regime for federal district court judges. Flamm, *Judicial Disqualification*, *supra* note 28, ch. 23. When this provision was originally considered by the United States Supreme Court in *Berger v. U.S.* (1921) 255 U.S. 22 (U.S.S.C.), the Court concluded that the allegation in the affidavit had to be “legally sufficient” to warrant the disqualification of the judge, thereby transforming the provision into one that only required disqualification where there was just cause. See also, Debra Lyn Basset and Rex Perschbacher, “The Elusive Goal of Impartiality” (“Elusive Goal”) (2011) 97 *Iowa L. Rev.* 181 at 211. [↑](#footnote-ref-33)
34. See, for example, McKoski, “Disqualifying Judges”, *supra* note 30; 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 and 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 L. Rev.* 1213 at 1224 and 1251-1256 [↑](#footnote-ref-34)
35. See, for example, Bassett and Perschbacher, “Elusive Goal”, *supra* note 32; Christina Newton, “Interpreting *Caperton*: a Hybrid Solution to the Public Choice Problems of Judicial Elections” (2011) 8 *J. L. Econ. and Policy* 143. [↑](#footnote-ref-35)
36. Clause 170.1(a)(2)(C) creates a comparable presumption for judges who “served as a lawyer for or officer of a public agency that is a party” to a proceeding. In this instance, the judge is presumed to have served as a layer in the proceeding “if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.” [↑](#footnote-ref-36)
37. Flamm, *Judicial Disqualification*, ch. 17. [↑](#footnote-ref-37)
38. *Ibid.* at § 17.2. [↑](#footnote-ref-38)
39. *Ibid.* at § 17.6, p. 499. [↑](#footnote-ref-39)
40. *Ibid.* at § 17.6., pp. 501-02. [↑](#footnote-ref-40)
41. *Ibid.* at § 17.6., pp. 502. See, for example, Texas Rules of Civil Procedure, Rule 18a., ss. (f)-(g). [↑](#footnote-ref-41)
42. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. *Basic Law for the Federal Republic of Germany*, gesetze-im-internetde [*Basic Law for the Federal Republic of Germany*]. [↑](#footnote-ref-42)
43. Klaus Schreiber, ‘ZR Ausschließung und Ablehnung des Richters im Zivilprozess’ (2011) 33:10 JURA - Juristische Ausbildung; Basic Law for the Federal Republic of Germany, *supra* note 2. Art. 101 (1)(2) provides: No one may be removed from the jurisdiction of his lawful judge. [↑](#footnote-ref-43)
44. Christoph Sowada, *Der gesetzliche Richter im Strafverfahren*, ed (Berlin: Walter de Gruyter, 2002). [↑](#footnote-ref-44)
45. Basic Law for the Federal Republic of Germany, *supra* note 2. [↑](#footnote-ref-45)
46. 137 Abs. 1 Satz 1 StPO. [↑](#footnote-ref-46)
47. § 54 Abs. 1 VwGO. Alexander Ignor, ‘Befangenheit im Prozess’ (2012) 5 Zeitschrift für Internationale Strafrechtsdogmatik. At 230. Note that administrative courts are not equivalent to Canadian administrative tribunals as judges rather than tribunal members sit on these courts. [↑](#footnote-ref-47)
48. Gunther Arzt, *Der befangene Strafrichter: Zugleich eine Kritik an der Beschränkung der Befangenheit auf die Parteilichkeit* (Tübingen: Mohr Siebeck, 1969). at 1. [↑](#footnote-ref-48)
49. … wenn der Ablehnende bei verständiger Würdigung des ihm bekannten Sachverhalts Grund zu der Annahme hat, dass der oder die abgelehnten Richter ihm gegenüber eine innere Haltung einnehmen, die ihre Unparteilichkeit und Unvoreingenommenheit störend beeinflussen kann. Gunter Widmaier & Stephan Barton, *Münchener Anwaltshandbuch Strafverteidigung*, ed (Beck-Online: Beck C. H., 2006). at para 73. [↑](#footnote-ref-49)
50. BGH StV 88, 417. [↑](#footnote-ref-50)
51. BGH NJW 68, 710 and *Ibid*. at para 73. [↑](#footnote-ref-51)
52. There are reasons to doubt this construction. Lamprecht argues that recusal motions intrude into the core of a carefully constructed lawyerly and judicial identity in which objectivity and dispassionate reason are highly valued. This professional (de-) formation makes it difficult for judges to acknowledge and address the psychological impact of recusal motions and causes judges to retreat into surface reasoning and boilerplate justifications. Rolf Lamprecht, Befangenheit an sich: Über den Umgang mit einem prozessualen Grundrecht NJW 1993, 2222 at 2223. [↑](#footnote-ref-52)
53. Herbert Taubner, *Der befangene Zivilrichter*, ed (Konstanz: Hartung-Gorre, 2005). [↑](#footnote-ref-53)
54. (pro: Stemmler, Befangenheit im Richteramt; contra: Ohain). [↑](#footnote-ref-54)
55. Klaus Ellbogen & Felix Schneider, ‘Besorgnis der Befangenheit bei Ehe zwischen Richterin und Staatsanwalt’ (2012) 5 Juristische Rundschau 188. [↑](#footnote-ref-55)
56. Florida reached the opposite conclusion in the balancing of these concerns. There, the Code of Judicial Conduct, Canon 3E(1)(d) provides that “A judge shall disqualify himself or herself where the judge or the judge’s spouse, a person within the third degree of relationship to either the judge or the spouse, or the spouse of the relative is a party or officer, director or trustee of a party in the proceeding; a lawyer in the proceeding; is known by the judge to have more than a de minimis interest that could be substantially affected by the proceeding; or is to the judge’s knowledge likely to be a witness in the proceeding. [Emphasis added] [↑](#footnote-ref-56)
57. BGH 5th Zivilsenat, decision dated 15th March 2012 - V ZB 102/11. See: Katrin Dittert, Richterablehnung wegen Tätigkeit dessen Ehegatten in der von der Gegenseite beauftragten Rechtsanwaltskanzlei. jurisPR-MietR 15/2012 Anm. 5. [↑](#footnote-ref-57)
58. BVerfGE 102, 192 dated 12 July 2000. [↑](#footnote-ref-58)
59. BVerfGE 108, 122 at paras 24-26. [↑](#footnote-ref-59)
60. BGH 5. Strafsenat, Urteil vom 12.09.2007 - 5 StR 227/07 [↑](#footnote-ref-60)
61. Gesetz zur Regelung der Verständigung im Strafverfahren vom 29. Juli 2009 (BGBl S. 2353). [*Regulation of Communications in Criminal Proceedings Act*, July 29, 2009]. [↑](#footnote-ref-61)
62. BVerfG, 2 BvR 2628/10 dated 19th March, 2013. [↑](#footnote-ref-62)
63. “Refining the Test”, *supra* note 20, at 191. [↑](#footnote-ref-63)
64. Gunnar Sticken, *Die ‘neue’ materielle Prozeßleitung (§ 139 ZPO) und die Unparteilichkeit des Richters*, ed (Köln Berlin München: Carl Heymanns Verlag, 2004). [↑](#footnote-ref-64)
65. Sticken, *supra* note 19. At 187. [↑](#footnote-ref-65)
66. Jona Goldschmidt, *How are Judges and Courts Coping with Pro Se Litigants?*, ed (1997). [↑](#footnote-ref-66)
67. Richard Devlin, C Adèle Kent & Susan Lightstone, ‘The Past, Present ... and Future(?) of Judicial Ethics Education in Canada’ (2013) 16:1 Legal Ethics 1.; Jona Goldschmidt, ‘Judicial Assistance to Self-represented Litigants: Lessons from the Canadian Experience’ (2008–9) 17(3) Michigan State Journal of International Law 601. [↑](#footnote-ref-67)
68. This is very similar to the common law tradition of a strong presumption of impartiality. [↑](#footnote-ref-68)
69. Sebastian Lovens, *Bundesverfassungsrichter zwischen freier Meinungsäußerung, Befangenheit und Verfassungsorgantreue*, ed (Baden-Baden: Nomos, 2009). [↑](#footnote-ref-69)
70. BVerfGG Art. 4. [↑](#footnote-ref-70)
71. Code of Criminal Procedure (StPO), *supra* note 3. S. 24(3). [↑](#footnote-ref-71)
72. Code of Criminal Procedure (StPO), *supra* note 3. S. 397(1). [↑](#footnote-ref-72)
73. See Kate Malleson, “Safeguarding Judicial Impartiality” (2002) 22 *Legal Studies* 53 at 62. [↑](#footnote-ref-73)
74. See Hughes and Bryden, “Refining the Test”, *supra* note 20, at 180-81 and 189. [↑](#footnote-ref-74)
75. This is a common feature of judicial systems based on the English model, but it is not a universal feature of legal systems around the world. For example, the judicial system in Germany and other European countries draws its members from persons who were trained as adjudicators rather than from the ranks of the legal profession. [↑](#footnote-ref-75)
76. See, for example, *Committee for Liberty and Justice v. National Energy Board*, [1978] 1 S.C.R. 369; *R. v. Catcheway*, 2000 SCC 33, [2001] S.R.C. 838; *Barrett v. Glynn* (2001), 209 D.L.R. (4th) 735 (Nfld. C.A.). [↑](#footnote-ref-76)
77. See *Wewaykum*, *supra* note 3. [↑](#footnote-ref-77)
78. *Ethical Principles for Judges*, *supra* note 14 at Commentary E19(c), p. 52. While the choice of any particular cooling off period is somewhat arbitrary, our preference is for a period at the shorter end rather than the longer end of the range. In circumstances in which a judge harbours lingering doubts about his or her ability to be impartial in adjudicating a matter involving a former colleague or client, it is always open for the judge to recuse notwithstanding the fact that the cooling off period has elapsed. On the other hand, a judge is not in a position to abridge the cooling off period if the judge is satisfied that there is no actual basis for concern about his or her ability to adjudicate impartiality, since this would be inconsistent with the rationale for establishing the cooling off period in the first place. [↑](#footnote-ref-78)
79. See, for example, 28 U.S.C. § 455(b) (2) and (3); German Code of Criminal Procedure § 22(4) and (5); German Code of Civil Procedure § 41(4), (5) and (6). [↑](#footnote-ref-79)
80. 28 U.S.C. § 455(b) (2). [↑](#footnote-ref-80)
81. 28 U.S.C. § 47, which reads: “No judge shall hear or determine an appeal from a case or issue tried by him.” [↑](#footnote-ref-81)
82. See, for example, Supreme Court Act s. 28(1); NB Judicature Act s. 8(7); Alberta Court of Appeal Act, R.S.A., c. C-30, s. 11. [↑](#footnote-ref-82)
83. (1993) 510 U.S. 540 (U.S.S.C.) [↑](#footnote-ref-83)
84. Supreme Court Family Rules, BC Reg 169/2009, Rules 7-1(17) and 7-2(3). [↑](#footnote-ref-84)
85. Civil cases in Quebec are exceptional in this respect, since recusal is governed by Chapter V of Title IV of the *Code of Civil Procedure*, *supra* note 27, and ss. 236-42 set out procedural rules governing recusal.

 [↑](#footnote-ref-85)
86. See Bryden and Hughes, “Tip of the Iceberg”, *supra* note 4 at 576-77. [↑](#footnote-ref-86)
87. See Bryden, “Legal Principles”, *supra* note 6 at 590-94. Geoffrey Lester has suggested that a preferable practice would be for counsel to make an informal application from the bar table with appropriate supporting materials, but he acknowledges that the use of a motion is the common practice. Geoffrey Lester, “Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure” (2001) 24 *Advocates Quarterly* 326 at 342-46. [↑](#footnote-ref-87)
88. See, for example, *Lambert v. Lacey-House*, 2013 NBCA 48 (N.B.C.A.). The New Brunswick Court of Appeal has advised that in these situations, the proper practice is for the judge to seek submissions and render the decision personally, rather than to seek a waiver from the parties or indicate that the judge will automatically recuse if the party raises an objection. [↑](#footnote-ref-88)
89. This view is consistent with the conclusions of Canadian Judicial Council in its report concerning a complaint concerning the recusal of Justice Jean-Guy Boilard in the midst of a long and complicated criminal trial after he received a letter from the Canadian Judicial Council criticizing his treatment of one of the lawyers in a related case. The Council observed that it is the individual responsibility of every judge to determine whether there are circumstances that prevent him or her from continuing to hear a case, and in the absence of evidence of bad faith, there is no basis for criticism of that decision. Report of the Canadian Judicial Council to the Minister of Justice of Canada under s. 65(1) of the Judges Act concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec, December 19, 2003, online at <http://www.cjc-ccm.gc.ca/cmslib/general/conduct_inq_boilard_ReportIC_200312_en.pdf> at pp. 3-4. [↑](#footnote-ref-89)
90. S.Q. 2007, c. 7, ss. 48-51. [↑](#footnote-ref-90)
91. See, for example, Basset and Perschbacher, “Elusive Goal”, *supra* note 32 at 203-07 and 213-14; Amanda Frost, “Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal” (2005) 53 *U. Kan. L. Rev.* 531 at 571-72 and 583-87. [↑](#footnote-ref-91)
92. See *Ebner v. The Official Trustee in Bankruptcy,* (2000) 176 A.L.R. 644 (Aust. H.C.) at para. 74 (per Cullinan, J,) and Sir Anthony Mason, “Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review” (1998) 1 *Constitutional Law and Policy Review* 21. [↑](#footnote-ref-92)
93. See Bryden, Legal Principles, *supra* note 6 at 594-95. [↑](#footnote-ref-93)
94. See *SOS-Save Our St. Clair Inc. v. Toronto (City)* (2005) 78 O.R. (3d) 331 at paras. 19-20 (per Greer and Macdonald, JJ. and paras. 115-18 (per Matlow, J.) (Ont. Div. Ct.); cf. *C.E.P., Local 60N v. Abitibi Consolidated Inc.*, 2008 NLCA 4 at para. 35 (N.L.C.A.)

 [↑](#footnote-ref-94)
95. *Ibid.* [↑](#footnote-ref-95)
96. This approach was adopted in admittedly unusual circumstances by the South African Constitutional Court in *President of the Republic of South Africa v. South African Rugby Football Union*, [1999] (4) S.A. 147 (S.A. Const. Ct.). In that case the applicants sought the recusal of five of the ten members of the Court, and further allegations and complaints were made about all of the members of the Court. With the agreement of counsel, the entire Court heard the motion for recusal. [↑](#footnote-ref-96)
97. This is the approach used by the New Zealand Supreme Court in *Siemer v. Heron*, 2011 NZSC 116 (N.Z. Sup. Ct.). The applicant sought an order that two members of the Court not sit on the case on the basis of an apparent bias against him, and the other three members of the Court heard and dismissed the application. [↑](#footnote-ref-97)