Court of Appeal of New Zealand
Te Kōti Pīra o Aotearoa

RECUSAL GUIDELINES

Section 171 of the Senior Courts Act 2016 requires the President of the Court of Appeal, in consultation with the Chief Justice, to develop and publish guidelines to assist Judges of the Court of Appeal to decide if they should recuse themselves from a proceeding. The following recusal guidelines have been adopted accordingly.

Introduction

1. The Judges of the Court of Appeal have agreed on some administrative guidelines as to the processes to be followed to determine issues about recusal. The procedures described are intended only as guidance. Decisions about recusal are very much fact dependent and the approach to be taken in a particular case may vary depending on the factual matrix.

Guiding principles

2. A Judge is disqualified from sitting if in the circumstances there is a real possibility that in the eyes of a fair-minded and fully informed observer the Judge may not be impartial in reaching a decision in the case.

3. The test is a two-step one requiring consideration of:

    a. what are the circumstances relevant to the possible need for recusal because of apparent bias; and

    b. whether those circumstances lead to a reasonable apprehension the judge may not be impartial.

Process guidelines

4. Prior to the President allocating panels for given cases in the Permanent Court, a list of prospective cases will be circulated on a monthly basis so that Judges can indicate cases on which they should not be listed for conflict reasons.

5. A similar approach will be followed for cases in the Divisional Court, with lists of prospective cases circulated approximately two weeks before the hearings. Panel members in the Divisional Court should raise any potential conflict issues with the presiding Judge in the first instance.

6. After a Judge has been assigned to a case and seen the papers, that Judge may realise that there is some matter concerning his or her prospective involvement which he or she did not detect earlier and which the Judge considers means he/she should recuse him/herself. In these circumstances, the Judge will stand aside.

7. Where the issue is not clear cut, the Judge should consult, at that point, with other members on the panel and the President. If, after consultation, the Judge considers the parties should be informed, there should be a formal communication by Minute of the Judge delivered through the Registrar.

8. After a case is listed, objection may be raised by a party to a given Judge sitting. That objection should be directed in the first instance to the particular Judge. That Judge will consider the matter and in so doing will consult with the other Judges on the panel and the President as to whether he or she should sit.

9. If, in either of the cases discussed in [7] and [8] above, the Judge does not decide to stand down, the parties should be informed by Minute. If the party maintains an objection, the parties will have the opportunity to file brief written submissions, normally no more than three pages. On occasion affidavits may be required.

10. The impugned Judge should be invited, if he or she wishes to do so, or if the panel requests it, to lodge a memorandum with any information and observations that Judge wishes to make on the question of recusal. The Judge should include in the memorandum any known circumstances which may give rise to a concern that the Judge may not be impartial in the case. This will be made available to the parties.

11. The matter will then be determined either on the papers or at an oral hearing, possibly by telephone, by the panel including the impugned Judge unless the President otherwise directs. The President's decision as to the composition of the panel will depend on matters such as the nature and seriousness of the objection and the circumstances in which it is raised.

12. On the day oral applications are not considered appropriate. If a recusal issue is raised at this late stage, the allocated panel will deal with the matter then and there.

Stephen Kós P
August 2017