TE KOOTI WHENUA MĀORI

MĀORI LAND COURT

RECUSAL GUIDELINES

1. Introduction

The question of recusal is one that all judges must make themselves, having regard to the particular circumstances before them. These guidelines are provided to assist judges of the Māori Land Court in considering any question of recusal.

2. General Principles

A judge has an obligation to sit on any case allocated to them unless grounds for recusal exist.

A judge should recuse him or herself if, in the circumstances, a fair-minded, fully informed observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

The standard for recusal is one of “real and not remote possibility”, rather than probability.

The test is a two-stage one. The judge must consider

1. First, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and

2. Second, whether there is a “logical and sufficient connection” between those circumstances and that apprehension. (See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35; *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122)

The question of recusal is for the judge hearing the case. Some of the matters the judge should consider are:

1. A judge should apply the above principles firmly and fairly and not accede too readily to suggestions of bias.

2. A judge should be mindful of the burden for other judges if the judge recuses him or herself unnecessarily.

3. A judge is not required to recuse him or herself merely because the issues involved in a case are in some indirect way related to the judge’s personal experience or that the judge has previously dealt with the case.

4. The making of a complaint to the Judicial Conduct Commissioner against a judge does not of itself serve to disqualify the judge from hearing cases involving the complainant.

5. If, after considering all relevant circumstances, there is doubt about whether there may properly be an appearance of bias, it may be prudent for the judge to decline to sit in that case.

The apprehension of bias is case dependent. The fact that a particular relationship falls outside the examples in these guidelines does not automatically mean that there cannot be a reasonable apprehension of bias in the particular circumstances of the case at hand.

3. Circumstances where a conflict of instance may arise

Guidelines on circumstances where a conflict of interest may arise are set out below. These are not intended to be exhaustive, but to provide guidance on common areas that may give rise to a conflict.

Conflict of interest generally

Judges should recuse themselves wherever they have personal knowledge of disputed facts in proceedings, or wherever they have a personal view concerning a party or witness of disputed fact in the litigation.

Conflicts of interest arise in a number of different situations. Judges should be alert to any appearance of bias arising out of connections with litigants, witnesses or their legal advisors, and should always inform the parties of facts that might reasonably give rise to a perception of bias or conflict of interest.

Conflict of interest arising out of legal practice

Judges should recuse themselves if they served as a legal advisor when in practice on a matter in issue when in practice. If the matter in issue was dealt with by the firm at a time when the judge was a member of the firm, the judge may need to consider recusal even if the judge had no personal involvement in providing advice about it if the Judge obtained relevant knowledge about the matter in issue or had formed a view of the parties.

Close relationships

Judges should recuse themselves if they are in a close relationship with litigants, legal advisors or witnesses in a case. It is impossible to be categorical about what relationships may give rise to concern about impartiality, but close blood relationships or domestic relationships are clearly disqualifying. Māori Land Court judges will also need to consider connections through whakapapa. If judges have any concerns or doubts, they should discuss them with the Chief Judge.

Although appearances by family members as counsel are not common, judges should be particularly careful if that situation arises. In a contested case, they should take timely steps to ensure that the other party has full knowledge of the situation, and the opportunity to make submissions on any question of recusal.

Most judges will enjoy long-standing friendships with practitioners, and links with former partners and colleagues. These need not be terminated upon appointment to the bench,

and subject to actual conflicts of interest arising from knowledge of clients or circumstances, such connections should not generally affect a judge's impartiality.

Recusal where opinions expressed are inconsistent with impartiality

Judges should consider recusal if the case concerns a matter upon which they have made public statements of firm opinion after appointment. It is not generally necessary for judges to recuse themselves simply because of having previously decided a case against one of the parties, or because evidence of a material witness has been rejected on another occasion.

Recusal where economic interest exists

Judges should recuse themselves if they have, or a close relative or member of their household has, a direct or indirect economic interest in the outcome of the proceedings. This may arise out of beneficial interests in a trust or incorporation, current commercial or business activities, financial investments (including shareholding in public or private companies), or membership or involvement with educational, charitable or other community organisations that may be interested in the litigation.

Shareholding in litigant companies or companies associated with litigants should be disclosed. They should always lead to recusal if the shareholding is large or if the value of the shareholding would be affected by the outcome of the litigation. Where the shareholding is small, full disclosure should still be made.

All judges have dealings with banks, insurance companies and the like. Similarly, many will hold shares in publicly listed companies. Generally, these interests will be such that they are unlikely to be affected by a particular piece of litigation and they are commonly disregarded. The preferable course is for a judge to disclose any such interest to parties in a proceeding and to seek the views of parties before making any final decision on recusal.

Careful consideration will be needed in situations where a judge's spouse, partner or a family member has an involvement or a financial interest in the outcome of a proceeding.

Disclosure of conflict of interest

Principles

Adequate disclosure protects the integrity of the judicial process and is also a defence against later challenges to the decision.

Disclosure does not constitute an acknowledgement that the circumstances give rise to a reasonable apprehension of bias.

Disclosure of any matter which might give rise to objection should be undertaken even if the judge has formed the view that there is no basis for recusal. There may be circumstances not known to the judge which parties may raise consequentially upon such disclosure.

Practice

Disclosure should be made as early as possible before the hearing.

When making disclosure, the judge should issue a minute through the Registrar to counsel for all parties.

The judge should ensure that the minute contains sufficient information, without unnecessary detail, to enable the parties to decide whether to make a recusal application. It is undesirable for parties to be placed in the position of having to seek further information from the judge.

On occasion advance disclosure often may not be possible in light of listing arrangements. In this situation, disclosure on the day of the hearing may be unavoidable. If this occurs:

1. Discussion between the judge and the parties about whether to proceed should normally be in open court, unless the case itself is to be heard in chambers.

2. The parties should be given an opportunity to make submissions on recusal after full disclosure of the circumstances giving rise to the question of recusal.

3. The judge should be particularly mindful of the difficult position that the parties and their advisors are placed in by disclosure on the day of the hearing. Late disclosure puts the parties in a situation where it might appear to them that consent is sought even although a ground of recusal actually exists.

The consent of the parties to a judge sitting is important but not determinative, as the subjective perceptions of the parties are not relevant to whether there is a reasonable apprehension of bias.

1. Even where parties consent, the judge should nonetheless recuse himself or herself where he or she is satisfied recusal is required.

2. In other cases, where the judge has disclosed a matter which might give rise to objection and has heard and considered submissions, he or she may form the view that the hearing may proceed notwithstanding the lack of consent.

In circumstances of urgency, where the judge cannot be replaced for practical reasons, he or she may need to hear the case, notwithstanding that there may exist arguable grounds in favour of recusal. Consent will be a particularly relevant consideration in this situation.

W W Isaac
Chief Judge
12 December 2018