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# Constitutional Legitimacy and Responsibility: Confronting Allegations of Bias After *Wewaykum* *Indian Band v. Canada*

Adam M. Dodek\*

## I. INTRODUCTION

Most cases at the Supreme Court can be grouped into one of two categories: appeals where leave is granted because they contain an issue of public importance<sup>1</sup> or appeals as of right in criminal cases where at least one justice of a provincial court of appeal has dissented.<sup>2</sup> *Wewaykum Indian Band v. Canada*<sup>3</sup> began as an ordinary case in the first category but morphed into one of those rare cases that inhabit a category of their own — a Third Way if you like. In this category dwell those rare cases where some aspect of the Court itself becomes an issue

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\* Director of Policy to the Hon. Michael J. Bryant, Attorney General of Ontario, Minister Responsible for Native Affairs and Minister Responsible for Democratic Renewal. The opinions expressed in this paper do not reflect the views of the Attorney General of Ontario or of the Ministry of the Attorney General of Ontario. Thanks to Greg Crone, Julia Hanigsberg, Lorne Sossin, and Ria Tzimas for reading earlier drafts of this paper and providing helpful comments and to Eric Davis for great research assistance. Special thanks to Murray Segal for his sage advice in this area.

<sup>1</sup> See *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40.

<sup>2</sup> See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 691-693. Provisions for appeals to the Supreme Court are found in other statutes, but most notably in the *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 35.1-41.

<sup>3</sup> [2002] 4 S.C.R. 245, 2002 SCC 79, [2002] S.C.J. No. 79 [hereinafter "*Wewaykum (No. 1)*"], affirming [1999] F.C.J. No. 1529 (C.A.), motion to vacate judgment denied, [2003] 2 S.C.R. 259, [2003] S.C.J. No. 50, 2003 SCC 45 [hereinafter "*Wewaykum (No. 2)*"]. For ease of reference, the December 2002 judgment will be referred to as "the merits judgment" or "the December 2002 judgment" and the September 2003 judgment will be referred to as "the disqualification judgment" or "the disqualification motion."

on appeal; in the words of Marshall McLuhan, these are cases where the medium becomes the message.<sup>4</sup> *Wewaykum* is such a case.<sup>5</sup>

*Wewaykum* began as an important Aboriginal law case primarily dealing within the Crown's fiduciary duty to First Nations. It then spawned an important administrative law decision addressing reasonable apprehension of bias. However, as I argue below, *Wewaykum* is also an important *constitutional* case because it involved a challenge to the legitimacy of the Supreme Court. After judgment had been rendered in the case, a motion was brought to vacate it on the grounds that the judgment was tainted by the reasonable apprehension of bias involving one of the nine members of the Court that heard the appeal. This was the first such attempt to "nullify" a decision that had been rendered by the Supreme Court. However, it reflected a recent international trend to challenge decisions or decision makers of high courts on the grounds of bias.

This paper has two main parts in addition to this introduction. The first part is retrospective; in it I review the events and the disqualification decision in *Wewaykum*. This is the necessary background and bridge for the focus of the paper in the second part which is decidedly prospective. In this part, I argue why *Wewaykum* is an important *constitutional* case. I contend that judicial impartiality is a core value in our constitutional system and that a number of parties have duties to protect

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<sup>4</sup> Marshall McLuhan, *Understanding Media: The Extensions of Man* (Toronto: McGraw-Hill, 1964), at 7.

<sup>5</sup> I would include the following cases into this category: *Smith v. Jones*, [1999] 1 S.C.R. 455, [1999] S.C.J. No. 15 (public safety exception to solicitor-client privilege) (case noteworthy for sweeping publication ban, use of pseudonyms and Court direction for oral hearing on leave to appeal — see Adam M. Dodek, "The Public Safety Exception to Solicitor-Client Privilege: *Smith v. Jones*" (2001) 34 U.B.C. L. Rev. 293); *Reference re Milgaard*, [1992] 1 S.C.R. 866, [1992] S.C.J. No. 35 (where Supreme Court of Canada heard *viva voce* evidence and where discussions in chambers by Chief Justice became subject of subsequent controversy, see "Milgaard Witness Gets Protection" *Toronto Star* (20 February 1992); "Milgaard Key Witness Tells Court: I'm Afraid" *Toronto Star* (20 February 1992); "Ex-bikers Reveal Mystery Milgaard Witness" *Toronto Star* (21 February 1992); "Can't Help Milgaard, Mystery Woman Says" *Toronto Star* (22 February 1992); "Witness Said Trying to Settle a Score" *Regina Leader Post* (3 March 1992) A2; "Mystery Woman Willing to Testify" *Regina Leader Post* (22 February 1992) A1; "Witness Said Husband Lied at 1970 Trial" *Regina Leader Post* (20 February 1992) A1; "Witness Upset with Protection Plan" *Saskatoon Star Phoenix* (3 June 1995) A1; "Fearful Witness Given Police Protection" *Saskatoon Star Phoenix* (20 February 1992) A1).

the guardians of our Constitution, the Supreme Court of Canada. In response to the age old question of *Sed quis custodiet ipsos Custodes?* — who guards the guardians — I argue that Parliament, the bar and the Court itself each have a duty to protect the integrity of the Court.

## II. BACKGROUND

### 1. Chronology

On December 6, 2002, the Supreme Court of Canada rendered judgment on the merits in *Wewaykum*.<sup>6</sup> The unanimous judgment of the full nine member bench was written by Binnie J. Two Indian bands in British Columbia each claimed the other's reserve land and each claimed breach of fiduciary duty against the federal Crown. The Federal Court and the Federal Court of Appeal rejected their claims and the Supreme Court dismissed their appeals.<sup>7</sup>

After release of the Court's reasons, the solicitor for one of the bands reviewed the reasons with the band who were upset by both the tone and the result of the appeal. According to counsel, they decided to make a freedom of information request as a way to help quell any concerns by the losing band that there was anything untoward in the decision.<sup>8</sup> In February 2003, one of the unsuccessful Indian bands made a request under the *Access to Information Act*<sup>9</sup> seeking:

... copies of all records, including letters, correspondence and internal memoranda to, from or which make reference to Mr. William Binnie (Ian Binnie) [now Justice Binnie] in the matter of the claim against Canada by the Wewaykum (or Campbell River) Indian Band and the

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<sup>6</sup> *Wewaykum (No. 1)*, *supra*, note 3.

<sup>7</sup> For more information on the merits judgment, see Leonard I. Rotman, "Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" Pacific Business & Law Institute, Ottawa, 10-11 September 2003 [unpublished]; E. Ria Tzimas, "Wewaykum: An Opportunity to Review Fiduciary Law in Canadian Aboriginal Jurisprudence" Second Annual Aboriginal Law Forum, Insight Information Co., Toronto, 17-18 November 2003 [unpublished].

<sup>8</sup> *Wewaykum (No. 2)*, *supra*, note 3, at paras. 16-18.

<sup>9</sup> R.S.C. 1985, c. A-1.

Wewaikai (or Cape Mudge) Indian Band for Quinsam IR 12 and Campbell River IR 11 between the years 1982 and 1986.<sup>10</sup>

The Department of Justice received the access to information request and found a number of internal memoranda to, from or making reference to Binnie and related to Campbell River's claim. These memoranda showed that in late 1985 and early 1986, in his capacity at the time as Associate Deputy Minister, Justice Binnie received some information and attended a meeting in the early stages of Campbell River's claim against Canada.

On May 23, 2003, the Assistant Deputy Attorney General wrote to the Registrar of the Supreme Court of Canada to inform her that as a result of the preparation of the Department of Justice's response to the access to information request, it appeared "that Mr. W.I.C. Binnie in 1985 and early 1986, in the course of his duties as Associate Deputy Minister of Justice, participated in discussions with Department of Justice counsel in the *Wewaykum* [Campbell River] *Indian Band* case."<sup>11</sup> Accompanying this letter were documents relating to Mr. Binnie's involvement in the case over which the Department waived solicitor-client privilege in view of its duty as an officer of the Court.

Canada also filed a motion for directions pursuant to Rule 3 of the Rules of the Supreme Court, as to what steps, if any, should be taken by reason of the information contained in the Assistant Deputy Attorney General's letter. The following factual information was set out in a Statement attached to the letter:

1. The case of *Wewaykum Indian Band v. Canada*, [2002] S.C.C. 79, file no. 27641 was heard in the Supreme Court of Canada on December 6, 2001 and judgment was rendered December 6, 2002.
2. The original claim in the case was filed in December 1985 and the original Defense on behalf of the Crown was filed on February 28, 1986.
3. The trial judgment was released by the Federal Court Trial Division on September 19, 1995 and the appeal judgment was released on October 12, 1999 by the Federal Court of Appeal.

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<sup>10</sup> *Wewaykum (No. 2)*, *supra*, note 3, at para. 15.

<sup>11</sup> *Wewaykum (No. 2)*, *supra*, note 3, at para. 19.

4. Mr. W.I.C. Binnie was Associate Deputy Minister from September 2nd, 1982 until July 31st, 1986; at that time he left the Department of Justice and entered private practice.
5. As Associate Deputy Minister, Mr. Binnie's duties included responsibility for all litigation, civil as well as criminal matters, involving the Government of Canada as a party, arising in the common law provinces and territories in Canada; in that context he would have had under his general supervisory authority thousands of cases. In addition to his responsibilities for litigation, Mr. Binnie was also responsible for Native Law in the Department.
6. In the course of preparation of a response to a request for information under the *Access to Information Act* received in February 2003, it has come to light that Mr. Binnie had occasion to discuss the case with Department counsel, in late 1985 and early 1986.
7. In the course of preparing for the hearing of the case before the Supreme Court of Canada, Department of Justice counsel noted the fact of Mr. Binnie's position as Associate Deputy Minister in 1985 and 1986, and asked themselves whether Mr. Binnie had had any specific involvement in the case.
8. Counsel did not conduct a thorough examination of the files. Consequently, Mr. Binnie's involvement was not discovered by counsel at that time.<sup>12</sup>

After the Crown's Motion for Directions was filed with the Court, Binnie J. filed the following statement in the form of a memorandum with the Registrar of the Court:

With respect to the Motion for Directions filed yesterday by the Crown, would you please place this note on the Court file and communicate its contents to counsel for the parties.

It is a matter of public record that between September 1982 and July 1986 I was Associate Deputy Minister of Justice responsible for all litigation for and against the federal Crown except tax matters and cases in Quebec. This included Indian claims. At any given time, the responsibility covered several thousand cases.

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<sup>12</sup> *Wewaykum (No. 2)*, *supra*, note 3, at para. 20.

When this appeal was pending before the Court in 2002, I had no recollection of personal involvement 17 years earlier at the commencement of this particular file, which was handled by departmental counsel in the Vancouver Regional Office.

I do not recall anything about any involvement in this case to add to what is set out in the departmental file.

I recuse myself from consideration of the pending motion.<sup>13</sup>

The Court invited further submissions by the parties respecting the Crown's motion for directions. The Crown responded by filing a memorandum in which it asserted that there was no reasonable apprehension of bias. In response, one of the Indian bands sought an order setting aside the Court's judgment and requesting that the Court recommend that the parties enter into a negotiation and reconciliation process.<sup>14</sup> The other Indian Band, supported by several other intervener Bands, sought an order vacating the Court's judgment. The Crown, supported by the Attorney General of British Columbia, as intervener, submitted that there was no reasonable apprehension of bias and therefore the motions to vacate should be dismissed.<sup>15</sup>

The Court heard the motion under an abridged timetable. While oral hearings for leave to appeal applications have generally been abandoned by the Court, it still hears some motions orally, usually on the first Monday of each session. It scheduled a special sitting for the *Wewaykum* disqualification motion, after it had completed hearing all of the cases for its spring session in 2003. The Court was very engaged in the issues before it, with the Chief Justice extending time for counsel to make their arguments. Nearly three hours after the motion began on Monday, June 23, 2003, the Court finally recessed for the summer after a hearing that raised more questions than it answered.

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<sup>13</sup> *Wewaykum (No. 2)*, *supra*, note 3, at para. 23.

<sup>14</sup> *Id.*, at para. 24. In the alternative, this Band sought an order suspending the operation of the judgment for four months to permit negotiation and reconciliation between the parties with further submissions to the Court if required: *id.*

<sup>15</sup> *Id.*, at paras. 25-27. The Attorney General of Ontario who had intervened in the merits hearing, took no position and did not participate in the disqualification motion.

## 2. The Disqualification Judgment

The Court — minus Binnie J. — reviewed the 17 documents and determined that no reasonable apprehension of bias existed to warrant Binnie J.’s disqualification. The Court highlighted the importance of impartiality and its presumption in our judicial system. It then clarified that there was a single standard for disqualification in Canada — that of reasonable apprehension of bias. In applying the test of reasonable apprehension of bias to the facts before it, the Court made three notable preliminary observations: (1) that the standard for demonstrating a reasonable apprehension of bias was high; (2) that these cases are highly fact-specific; and (3) when disqualification arises after judgment, inquiry into whether or not the judge would have recused himself or herself is not determinative.

Turning to the merits of the motion, in ruling that no reasonable apprehension of bias existed, the Court emphasized the following factors: (1) that Binnie J. had not been counsel in the case; (2) the passage of time; (3) Binnie J.’s lack of recollection of the matters of the case; and (4) the decision-making process of the Court. Each is discussed in turn below.

### (a) *Restrictive Reading of Counsel*

The Court adopted a narrow definition of “counsel” for the purposes of disqualification. The generally accepted rule is that no judge should sit in a case in which he or she acted as counsel at any stage of the proceeding. In applying this rule in *Wewaykum*, the Court adopted a different position than the more absolute rule encompassed by the statement of Laskin C.J. that judges “would not sit in any case in which they played any part at any stage of the case.”<sup>16</sup> Instead, the Court adopted a more flexible rule which accords with the differences between private and government practice.

The Court stated that it could not realistically be held that Binnie J. acted as counsel in this case. Rather the Court stated that his role was of

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<sup>16</sup> *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at 388 cited in *Wewaykum (No. 2)*, *supra*, note 3, at para. 80.



“a limited supervisory and administrative nature.”<sup>17</sup> The Court accepted that Binnie J.’s involvement with the litigation “exceeded *pro forma* management of the files” but noted that “he was never counsel of record, and played no active role in the dispute after the claim was filed.”<sup>18</sup> In so holding, the Court held that a reasonable person would have to take into account the characteristics of legal practice within the Department of Justice, as compared to private practice in a law firm.<sup>19</sup> The Court cited the Canadian Judicial Council’s *Ethical Principles for Judges*, which, with respect, is not of particular assistance on this issue. The *Ethical Principles* state the general rule that “circumstances must be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that the judge is not impartial.” They proceed to give some general guidelines, as follows:

- (a) A judge who was in private practice should not sit on any case in which the judge or the judge’s former firm was directly involved as either counsel of record or in any other capacity before the judge’s appointment.
- (b) Where the judge practised for government or legal aid, guideline (a) cannot be applied strictly. One sensible approach is not to sit on cases commenced in the particular local office prior to the judge’s appointment.<sup>20</sup>

The standard adopted by the Court in *Wewaykum* purposely eschews the bright-line rule advocated by Laskin C.J. in favour of a flexible approach to determining the import and the impact played by a judge’s prior involvement and balances that with other factors in the case as discussed below.

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<sup>17</sup> *Id.*, at para. 82.

<sup>18</sup> *Id.*, at para. 83.

<sup>19</sup> *Id.*, at para. 84.

<sup>20</sup> Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998), at 47.

*(b) Passage of Time and Binnie J.'s Lack of Recollection*

The Court held that the passage of time was a “significant” factor in its finding that no reasonable apprehension of bias existed. Justice Binnie’s involvement in the case dated back at least 15 years from the time that the case first was heard at the Supreme Court. In addition, the Court also noted that Binnie J.’s lack of recollection (as reflected in his statement filed with the Court) was relevant. Justice Binnie’s statement was not challenged and it is difficult to see how it could have been, except by the filing of other contradictory evidence. This procedure, as unusual as it appears, is preferable to procedure followed in some other jurisdictions, where the judge includes factual statements about his or her involvement for the first time in the decision on a disqualification motion.<sup>21</sup>

The approach adopted by the Supreme Court was a sensible and pragmatic one. There are times when the notion of the “reasonable person” or the “reasonable apprehension of bias” seems quite distant from everyday reality. However, these two factors are precisely the sorts of things that the ordinary “reasonable person” would likely consider relevant in considering a judge’s impartiality.

*(c) The Nature of the Supreme Court*

The disqualification judgment was revealing and notable for its discussion of the decision making process of the Supreme Court. This discussion was insightful to Court watchers and the public as well as being an exercise in risk management for the Court. During the hearing of the motion, Deschamps J. queried counsel on whether it made a

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<sup>21</sup> One could imagine a situation where a judge denies any recollection of the matters before the Court but evidence exists of the judge making reference to them in a public address or article. Short of this, it is difficult to conceive of the prospect of cross-examining a judge on a statement filed with this Court. As uncomfortable as the procedure followed by Binnie J. and the Court was in this case, it is clearly the preferable course of action. It is superior to the practice followed by the United States Supreme Court where no such statements are filed but justices, in the course of recusal or disqualification motions, include such statements of fact in their written reasons for decision on the motion with no opportunity for any party to rebut them or comment upon their legal ramification. See *Laird v. Tatum*, 409 U.S. 824 (1972) (motion to disqualify Rehnquist J. after judgment rendered) and *Cheney v. U.S. District Court*, 18 March 2004 (motion to recuse Scalia J. before case was heard).

difference whether the Court was composed of nine members or a single judge sitting alone and asked further whether a reasonable person takes into account the way the Court operates.<sup>22</sup> The problem with this point, as with much regarding the mythical reasonable person, is that the work of the Supreme Court is not well-known to lawyers, let alone to litigants or to members of the public. Only a few articles have been written on this subject<sup>23</sup> and when Supreme Court justices do feel comfortable discussing this subject, it is usually to legal audiences and the message does not get well-disseminated.

In *Wewaykum*, the Supreme Court addressed this vacuum by filling it. It stated as follows:

The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. . . . For present purposes, it is enough to say the following. Each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to “brief” the rest of the coram before the hearing. After the case is heard, each judge on the coram expresses his or her opinion independently. Discussions take place on who will prepare draft reasons, and whether for the majority or the minority. Draft reasons are then prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all.<sup>24</sup>

This appears to be the first time that the Court took the unusual step of explaining its process of decision making in a reported decision.

The explanation of its process also allowed the Court to engage in a form of risk management against future disqualification motions. Prior

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<sup>22</sup> See Transcript of Proceedings in Court File No. 27641, June 23, 2003, at 16-17.

<sup>23</sup> See John Sopinka, “The Supreme Court of Canada” in Brian A. Crane & Henry S. Brown, *Supreme Court of Canada Practice 2002* (Toronto: Carswell, 2002), at 393; Lorne Sossin, “The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada” (1996) 30 U.B.C. L. Rev. 279; Bertha Wilson, “Will Women Judges Really Make a Difference” (1990) 28 Osgoode Hall L.J. 507; Bertha Wilson, “Decision-making in the Supreme Court” (1986) 36 U.T.L.J. 227; and Robert Martin, “Ideology and Judging in the Supreme Court of Canada” (1988) 26 Osgoode Hall L.J. 797.

<sup>24</sup> *Wewaykum* (No. 2), *supra*, note 3, at para. 92.

to *Wewaykum*, the general rule is that a judgment tainted by bias cannot stand and is vacated.<sup>25</sup> In *Wewaykum*, the Court departed from the strict rule that bias of a single judge taints the entire panel and the judgment:

Here, the nine judges who sat on these appeals shared the same view as to the disposition of the appeals and the reasons for judgment. Cases where the tainted judge casts the deciding vote in a split decision are inapposite in this respect. In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.<sup>26</sup>

This passage is a form of risk management and prevention. First, it protects the Court if there is a finding of bias against a single judge. Vacating a Supreme Court judgment presents a number of serious obstacles because of the uncertainty of what happens in this situation. There are a number of possibilities. First, as mooted by Iacobucci J. during the oral hearing of the motion, was that the Court could have vacated its judgment and let the Court of Appeal decision stand.<sup>27</sup> A second option would be a rehearing of the case without the disqualified judge. A third option could be to disqualify the entire Court and strike a panel of ad-hoc Supreme Court justices drawn from the Federal Court.<sup>28</sup>

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<sup>25</sup> *Newfoundland Telephone v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at 645, [1992] S.C.J. No. 21.

<sup>26</sup> *Wewaykum (No. 2)*, *supra*, note 3, at para. 93.

<sup>27</sup> See Transcript of Proceedings in Court File No. 27641, 23 June 2003, at 12 (*per* Iacobucci J.)

<sup>28</sup> See *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 30 (appointment of *ad hoc* judge). This section provides, in pertinent part:

(1) Where at any time there is not a quorum of the judges available to hold or continue any session of the Court, owing to a vacancy or vacancies, or to the absence through illness or on leave or in the discharge of other duties assigned by statute or order in council, **or to the disqualification of a judge or judges**, the Chief Justice of Canada, or in the absence of the Chief Justice, the senior puisne judge, may in writing request the attendance at the sittings of the Court, as an *ad hoc* judge, for such period as may be necessary,

(a) of a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada; or

The Supreme Court's statement above in *Wewaykum* obviates the need to consider these options in most cases.

*Wewaykum* is also an exercise in disqualification motion prevention. Given the Court's statement on the effects of a finding of bias against a single judge, parties are now on notice that this will be unlikely to void a judgment of the Court. This will likely deter parties in the future from bringing motions for disqualification after judgment.

### III. FUTURE DIRECTIONS

#### 1. Overview

In *Wewaykum*, the need for reform was conceded by counsel for the Crown in the disqualification motion.<sup>29</sup> I want to distinguish between the *operational* and the *constitutional* imperative for reforms in this area. The *operational* case for reform was clearly demonstrated in *Wewaykum*: the disclosure of Binnie J.'s prior involvement with the issues in the case should not have occurred after the Court had rendered judgment on the merits. As acknowledged by counsel for the Crown and clearly in the mind of the Court at the hearing of the disqualification motion, counsel could have discovered Binnie J.'s prior involvement before the hearing of the case on its merits. The *constitutional* imperative for reform is less straightforward. As explained below, this argument is based on the premise that a challenge to the impartiality of the

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- (b) if the judges of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada are absent from Ottawa or for any reason are unable to sit, of a judge of a provincial superior court to be designated in writing by the chief justice, or in the absence of the chief justice, by any acting chief justice or the senior puisne judge of that provincial court on that request being made to that acting chief justice or that senior puisne judge in writing.

See generally Reynald Boulton, "Ad Hoc Judges of the Supreme Court of Canada" (1978) 26 Chitty's L.J. 289. The author thanks Madame Anne Roland, Registrar of the Supreme Court of Canada, for bringing this article to his attention. According to this article, the last time section 30 was used to appoint an *ad hoc* judge was in 1947.

<sup>29</sup> "Should there be some examination as to improving the system for the future? Should there be an analysis of systems of procedures within the department? Perhaps. But that has nothing to do with the decision that you are asked to make on whether or not to vacate." Transcript of Proceedings in Court File No. 27641, 23 June 2003, at 60 (*per* Mr. J. Vincent O'Donnell).

Supreme Court is an assault on our constitutional foundations. To be absolutely clear, in characterizing a challenge to the impartiality of the Supreme Court in such terms, I am referring to the seriousness of such allegations, not to the motives of those who bring them. However, the constitutional gravity of allegations of bias against the Supreme Court warrants heightened vigilance by all parties concerned. Indeed, I contend that all parties have a duty to protect the integrity of the Court's process which is captured in the idea of the collaborative constitutional duties of the bench, bar and the Legislature discussed below.

## 2. Constitutional Imperative

In the introduction, I asserted that *Wewaykum* was an important constitutional case. This is developed in more detail below, but in a nutshell, judicial impartiality should be considered a constitutional norm together with its twin, judicial independence. Because the Supreme Court is a constitutional organ,<sup>30</sup> when its impartiality is questioned, an issue of serious constitutional proportion exists. Let me try to unpack these ideas.

Section 11(d) of the Charter confers upon a person "charged with an offence" the right to a fair and public hearing by "an independent and impartial tribunal." In *Valente*,<sup>31</sup> the Supreme Court explained the twin concepts of "independence" and "impartiality." This case involved a challenge under section 11(d) to the system of appointing and remunerating Ontario's provincial court judges. The Court explained that the two concepts of "independence" and "impartiality" were related but each contained separate values or requirements. "Impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the

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<sup>30</sup> See *Constitution Act, 1867*, s. 101 (providing for General Court of Appeal for Canada) and *Constitution Act, 1982*, s. 41(d) (providing that an amendment to the Constitution in relation to the composition of the Supreme Court of Canada may only be made upon the unanimous consent of the Senate, the House of Commons and the legislatures of each province) and s. 42(1)(d) (providing that an amendment to the Constitution in relation to the Supreme Court of Canada, other than its composition, may only be made upon resolutions of the Senate and the House of Commons and resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate at least 50 per cent of the population of all the provinces).

<sup>31</sup> *R. v. Valente*, [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77 [hereinafter "*Valente*"].

traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others — particularly the Executive branch of government — that rests on objective conditions or guarantees. Judicial independence has both an individual and institutional component. The individual component encompasses such matters as security of tenure and the institutional independence of the court is reflected in its institutional or administration relationships to the Executive and legislative branches of government. The test for both impartiality and independence focuses on “perception” — the “reasonable apprehension” of bias or lack of independence, as the case may be.

Judicial independence and impartiality extend beyond section 11(d) of the *Charter*. Section 7 provides that everyone has “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The “principles of fundamental justice” include the right to a fair trial which includes the notion of an independent and impartial tribunal.<sup>32</sup> Therefore, anytime life, liberty or security of the person is at issue, impartiality is constitutionally mandated. However, I think it is fair to conclude that the requirement of judicial impartiality extends beyond the scope of section 7 and constitutionally permeates all judicial proceedings.

Judicial impartiality, like judicial independence, is likely one of the unwritten constitutional principles of our Constitution. In the *Provincial Judges Reference*, the Supreme Court held that the “constitutional home” for judicial independence was found in the Preamble to the Constitution which recognizes that Canada has a “Constitution similar in Principle to that of the United Kingdom.”<sup>33</sup> The Court held that sections 96-100 of the *Constitution Act, 1867* and section 11(d) of the *Charter* did not provide an “exhaustive and definitive code” for judicial independence<sup>34</sup> but rather provide proof of the existence of a general principle of judicial independence that applies to all courts no matter what

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<sup>32</sup> *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 93, [1997] S.C.J. No. 84 [hereinafter “*R.D.S.*”].

<sup>33</sup> *Provincial Judges Reference*, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75, at para. 109, citing the *Constitution Act, 1867*.

<sup>34</sup> *Id.*, at paras. 83, 85.

type of cases they hear.<sup>35</sup> Similar reasoning can be applied to judicial impartiality.

The nexus between judicial independence and judicial impartiality supports the conclusion that impartiality should also be considered an unwritten constitutional norm. As recognized by the Supreme Court, courts hold a central place within the Canadian system of government and are part of the “basic structure of our Constitution.”<sup>36</sup> Judicial impartiality is one of the bedrock principles of our legal system. It is fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. To this end, the Supreme Court has stated that “[w]ithout that confidence the system cannot command the respect and acceptance that are essential to its effective operation.”<sup>37</sup>

The link between judicial impartiality and judicial independence has been best articulated by the Constitutional Court of South Africa: “judicial impartiality and the application without fear, favour or prejudice by the courts of the Constitution and all law . . . are inherent in an accused’s right to a fair trial. . . . One of the main goals of institutional judicial independence is to safeguard such rights.”<sup>38</sup> In similar fashion, the Supreme Court of Canada stated in *R.D.S.* that “[a] system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.”<sup>39</sup>

The simple point that I am attempting to make here is that allegations of bias strike at the heart of our system of justice. They become all the more serious when they are leveled at our system’s highest court and constitutional arbiter.<sup>40</sup> It is for this reason that I argue that all players in

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<sup>35</sup> *Id.*, at para. 107.

<sup>36</sup> *Id.*, at para. 108, citing *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, [1987] S.C.J. No. 48, at 57.

<sup>37</sup> *R. v. Valente*, [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77, at para. 22.

<sup>38</sup> *S. v. Van Rooyen*, [2002] S.A.J. No. 39, at para. 35.

<sup>39</sup> *R. v. R.D.S.*, [1997] 3 S.C.R. 484, at para. 91, [1997] S.C.J. No. 84.

<sup>40</sup> The Supreme Court is itself a constitutional organ. See *Constitutional Act, 1867, supra*, note 33, s. 101. There is a debate on the extent to which Parliament may change aspects of the Court without constitutional amendment. See “Improving the Supreme Court of Canada Appointments Process,” Report of the Standing Committee on Justice, Human Rights, Public



the legal system have a role to play in protecting the integrity of the Supreme Court's decision making process.

In the last several years, attacks on the institutional legitimacy of high courts have increased in frequency. In South Africa, a motion was brought to recuse five of 11 justices of the Constitutional Court, in part on the grounds of the justices past affiliations with the governing African National Congress (ANC).<sup>41</sup> The allegation was that the members of the Court could not be impartial in a case where President Mandela was a party because of their connections to him or the ANC. The Court called the application for recusal "unprecedented . . . implicating each of the judges of this Court, questioning their impartiality, and impugning the integrity of the Court as an institution."<sup>42</sup> The application was dismissed.

In Great Britain, the Law Lords received a black eye when their initial decision in the *Pinochet* case<sup>43</sup> was vacated because of a finding that Lord Hoffman was automatically disqualified from hearing the case because of his connections to Amnesty International which was a party before the Court. In the United States, Scalia J.'s refusal to recuse himself in a case involving Vice-President Cheney with whom the Justice had gone duck hunting, became a lightning rod for criticism against Scalia and the Supreme Court in 2004. The criticism was particularly strident coming in the wake of the Supreme Court's decision in *Bush v. Gore*<sup>44</sup> which badly scarred that Court's legitimacy.<sup>45</sup> In short,

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Safety and Emergency Preparedness (May 2004) available online at: <<http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/justrp01/justrp01-e.pdf>>.

<sup>41</sup> *South Africa (President) v. South African Rugby Football Union*, [1999] S.A.J. No. 22. The recusal application alleged a reasonable apprehension of bias against all 11 members of the Court but targeted five of the justices by name because "after careful consideration" the applicant had decided to "leave it to the conscience" of the other members of the Court whether to recuse themselves. *Id.*, at para. 6.

<sup>42</sup> *Id.*, at para. 7.

<sup>43</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*, [1999] 2 W.L.R. 272, [1999] 1 All E.R. 577, [1998] H.L.J. No. 52 [hereinafter "*Pinochet*"].

<sup>44</sup> *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).

<sup>45</sup> A collective negative judgment about the Supreme Court's performance in this case risks developing a "gnawing sense of illegitimacy [which] eats away at the fabric of mutual confidence." Bruce Ackerman, "Introduction" in Bruce Ackerman, ed., *Bush v. Gore: The Question of Legitimacy* (New York and London: Yale University Press, 2002) vii, at viii. Constitutional giant Laurence Tribe expressed the fear that this decision may become

accusations of bias against a justice of the country's highest court are a direct result on the integrity of the Court itself and its place in the constitutional system.

### 3. Constitutional Responsibilities: Parliament, the Court and the Bar

Because the Supreme Court is a constitutional organ, it requires more stringent standards to protect its process. This calls for heightened measures by each of the three members of the constitutional "troika" that interact with the Supreme Court: the bar, Parliament and the Court itself. *Wewaykum* does not directly address the issue of what sort of measures are needed or recommended, however, this issue surfaced from time to time throughout the hearing of the disqualification motion.

Each of these three organs — the legislature, the Court and the bar — have a role to play in preserving the integrity of the Supreme Court and ultimately of the Constitution. Indeed, I would argue that they share a responsibility under our Constitution to do so. Generally, we only talk about duties on behalf of government to uphold the Constitution

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America's "judicial Vietnam" — undermining confidence in that country's judiciary even when dramatic interventions are constitutionally imperative." See Laurence Tribe *id.* See also Bruce Ackerman, "Introduction" in Bruce Ackerman, ed., *Bush v. Gore: The Question of Legitimacy* (New York and London: Yale University Press, 2002) vii, at ix; Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York and Oxford: Oxford University Press, 2001). Jed Rubenfeld has called the decision "worse even than the notorious *Plessy* [*v. Ferguson*] and it makes *Roe* [*v. Wade*] look like an exemplar of principled decision making." Jed Rubenfeld, "Not as Bad as *Plessy*. Worse." in Bruce Ackerman, ed., *Bush v. Gore: The Question of Legitimacy* (New York and London: Yale University Press, 2002) 20, at 20-21. Some of the harshest criticism of the Supreme Court's decision has come from Ronald Dworkin who has called *Bush v. Gore* "one of the least persuasive Supreme Court opinions that I have ever read." Ronald Dworkin, "Early Responses" in Ronald Dworkin, ed., *Bush v. Gore: A Badly Flawed Election* (New York: The New Press, 2002) 57, at 62. Dworkin concluded that he "continue[s] to think that the Court's decision is inexplicable except on grounds that concede its illegitimacy." Ronald Dworkin, "Introduction" in Ronald Dworkin, ed., *Bush v. Gore: A Badly Flawed Election* (New York: The New Press, 2002) 1, at 2. *Bush v. Gore* does certainly have its defenders: see Richard A. Posner, *Breaking the Deadlock: The 2000 Election, The Constitution and The Courts* (Princeton, Princeton University Press, 2001); Richard A. Posner, "*Bush v. Gore* as Pragmatic Adjudication" in Ronald Dworkin, ed., *Bush v. Gore: A Badly Flawed Election* (New York: The New Press, 2002), at 187; Charles Fried, "An Unreasonable Reaction to a Reasonable Decision" in Bruce Ackerman, ed., *Bush v. Gore: The Question of Legitimacy* (New York and London: Yale University Press, 2002) at 3. However, the inescapable conclusion is that *Bush v. Gore* has seriously injured the Court's credibility.

whereas individuals have rights under the Constitution which they seek to enforce against the government. However, the constitutional status of these organs, particularly the privileged status of an independent bar under our Constitution,<sup>46</sup> carries a concomitant responsibility to preserve the very Constitution from which their status flows.

(a) *Parliament*

At present, Parliament's rules regarding disqualification of Supreme Court justices are minimal and do not provide sufficient direction in this area. Section 28, entitled "When a Judge may not sit," provides only that "No judge against whose judgment an appeal is brought, or who took part in the trial of the cause or matter, or in the hearing in a court below, shall sit or take part in the hearing of or adjudication on the proceedings in the Supreme Court."<sup>47</sup> There are no known judicial interpretations of this section. To begin, it is not clear if this provision applies only to a judge who participated in the case below *qua* judge or also extends to the situation where a judge participated in some manner in the case below *qua* lawyer. Section 28 was not cited by the Court in *Wewaykum* which would lend support to the conclusion that the provision only includes the former but not the latter.

Parliament should follow the lead in other jurisdictions which have codified both the circumstances and the procedure for disqualification. In the U.S., Congress has a disqualification law that applies to all federal judges.<sup>48</sup> This law provides the circumstances under which a federal

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<sup>46</sup> See Roy Millen, "Unwritten Constitutional Principles and the Enforceability of the Independence of the Bar" [unpublished paper].

<sup>47</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 28(1).

<sup>48</sup> 28 U.S.C. § 455. This section provides:

**Sec. 455. – Disqualification of justice, judge, or magistrate judge**

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

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- (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
- (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
  - (ii) Is acting as a lawyer in the proceeding;
  - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
  - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
- (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
- (d) For the purposes of this section the following words or phrases shall have the meaning indicated:
- (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
  - (2) the degree of relationship is calculated according to the civil law system;
  - (3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
  - (4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:
    - (i) 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;
    - (ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
    - (iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
    - (iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.
- (e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be

judge must disqualify himself or herself and the circumstances where disqualification may be waived by the parties upon the full disclosure by the judge on the record of the circumstances surrounding the basis for disqualification.<sup>49</sup> Similarly, in Quebec, specific provisions of the *Code of Civil Procedure* address recusal.<sup>50</sup> Sections 234 and 235 of Quebec's *Code of Civil Procedure* set out the grounds for recusal<sup>51</sup> while section 236 provides that if a judge or a lawyer is aware of possible grounds for recusal, he or she must declare it in writing which is to be filed in the

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accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

<sup>49</sup> See 28 U.S.C. § 455(e).

<sup>50</sup> *Code of Civil Procedure*, R.S.Q. 1978, c. C-25, ss. 234-242.

<sup>51</sup> Section 234. A judge may be recused in particular:

(1) If the judge is the spouse of or related or allied within the degree of cousin-german inclusively to one of the parties;

(2) If the judge is himself or herself a party to an action involving a question similar to the one in dispute;

(3) If the judge has given advice upon the matter in dispute, or has previously taken cognizance of it as an arbitrator, if the judge has acted as attorney for any of the parties, or if the judge has made known his or her opinion extra-judicially;

(4) If the judge is directly interested in an action pending before a court in which any of the parties will be called to sit as judge;

(5) If there is mortal enmity between him or her and any of the parties, or if the judge has made threats against any of the parties, since the institution of the action or within six months previous to the proposed recusation;

(6) If the judge is the legal representative, the mandatary or the administrator of the property of a party to the suit, or if the judge is, in relation to one of the parties, a successor or a donee;

(7) If the judge is a member of an association, partnership or legal person, or is manager or patron of some order or community which is a party to the suit;

(8) If the judge has any interest in favouring any of the parties;

(9) If the judge is the spouse of or is related or allied to the attorney or counsel or to the partner of any of them, either in the direct line, or in the collateral line in the second degree;

(10) if there is reasonable cause to fear that the judge will not be impartial.

**235.** A judge is disqualified if he or his spouse is interested in the action.

court record and other parties must be notified. Section 237 includes a “diligence” requirement for the bringing of a motion for recusal. Section 238 provides that the judge against whom recusal is sought hears the motion which is subject to the normal rules regarding interlocutory appeals. Section 239 to 241 provide for notice to the Chief Judge and address the consequences of recusal. Section 242 provides that the parties may waive (in writing) any basis for recusal of a judge, except where the judge or the judge’s spouse has an interest in the action.

Neither the U.S. Code nor Quebec’s *Code of Civil Procedure* provide a “complete code” for recusal and disqualification, but they do provide a strong basis for the substantive grounds for disqualification. Quebec’s *Code of Civil Procedure* details the procedure to be followed for disqualification motions. For the Supreme Court of Canada, such procedures are generally contained in the Supreme Court Rules which the Rules Committee of the Court itself develops.

*(b) The Court*

Unless and until Parliament fills the void, the Court will be forced to protect itself. Disclosure — by both counsel and the Court — is imperative to ensure the integrity of the judicial process. Current guidance in this area is limited and in need of expansion. The *Ethical Principles for Judges* states on the one hand that a judge should disclose on the record anything which might support a plausible argument in favour of disqualification while on the other hand stating that a judge should make disclosure on the record and invite submissions from the parties in only two situations. Provisions of the Quebec *Code of Civil Procedure* mandate such disclosure.<sup>52</sup> The Court must be its own first line of defence by internally tracking judges’ connections to matters before it. To a large extent this is likely already being done. Erecting a protective fire-wall around the Court is necessary but not sufficient to insulate the Court from reasonable apprehension of bias. Counsel is often in a better position than the Court regarding information about a justice’s connections to the case.

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<sup>52</sup> *Code of Civil Procedure*, R.S.Q. 1978, c. C-25, s. 236 (“... a party who is aware of a ground of recusation against the judge must declare it without delay in a writing filed in the record and notify a copy to the judge and to the other parties”).

The Court needs the assistance of others. It should, either by way of rule or Notice to the Profession, instruct all counsel appearing before the Court that if they have any information regarding the involvement of a member of the Court with a case before it, counsel is obliged to bring that information to the Court's attention. Thus, it is suggested that in order to prevent future *Wewaykums*, the Registrar of the Supreme Court issue a Practice Direction instructing counsel to bring to the Court's attention any connection that one of the judges may have to the case before the Court which could possibly lead to the consideration of recusal or disqualification from the case. The suggested threshold is deliberately lower than the actual standard for disqualification. This is because disclosure of one issue may lead the Judge or other counsel to consider the issue further and find additional information which may in fact lead to a determination that a reasonable apprehension of bias exists and the judge should not sit. Or not.<sup>53</sup>

How should the Court address various operational issues regarding bias applications? In *Wewaykum*, the Court stated that the standard of

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<sup>53</sup> For example, it is well known that LeBel J. was batonnier of the Barreau du Quebec in 1983 and 1984. See biography of LeBel J. on the Supreme Court of Canada's website located online at <[http://www.scc-csc.gc.ca/AboutCourt/judges/lebel/index\\_e.asp](http://www.scc-csc.gc.ca/AboutCourt/judges/lebel/index_e.asp)>. As counsel in the *Finney* case, *infra*, note 62, against the Barreau du Quebec, we were concerned about discovering any possible involvement by LeBel J. in the facts that gave rise to the case, especially in light of *Wewaykum* which was released some months earlier. Both Deschamps and Fish JJ. had been involved in the *Finney* case as judges at the Quebec Court of Appeal and were likely disqualified from sitting on the case by virtue of s. 30 of the *Supreme Court Act*. We advised the Court and other counsel of this. See Letter of 12 September 2004 from A.M. Dodek to Registrar, Supreme Court of Canada in File No. 29344, online at: <[http://209.47.227.135/information/scc\\_case/docket\\_E.asp?caseno=29344](http://209.47.227.135/information/scc_case/docket_E.asp?caseno=29344)>.

In the course of reviewing documents in the *Finney* case we discovered that LeBel J., had appointed a discipline panel in a matter relating to the case at issue. There was no question that this involvement was insufficient to disqualify LeBel J. from the case: the discipline panel was disbanded and never heard the complaint; a new batonnier appointed the new discipline panel; the act of appointing a discipline panel was an administrative one. In short, LeBel J.'s connection with this case was extremely remote both in time and in substance. However, we raised this issue in a letter to the Registrar because of the possibility that it might trigger some further recollection in the mind of LeBel J. or of counsel for the Barreau du Quebec if LeBel J. had any deeper involvement in the case. Since our letter did not receive any response from the Court or from opposing counsel, it is assumed that LeBel J. had no additional recollections or connections to the case. In short, the matter was put to rest in advance of the hearing where LeBel J. was one of the coram of seven justices who heard the case. See generally Supreme Court File No. 29344 available online at <[http://209.47.227.135/information/scc\\_case/docket\\_E.asp?caseno=29344](http://209.47.227.135/information/scc_case/docket_E.asp?caseno=29344)>.

“reasonable apprehension of bias” was the same whether a motion for recusal is brought *ex ante* or whether a motion for disqualification is brought after judgment. While strictly speaking, this is correct, the Court’s statements indicated that the standard has different components in different contexts.

In addition, the procedures for bringing a motion for recusal differ from that of a motion for disqualification. A motion for recusal is technically made to the Chief Justice because the coram of judges who will hear a case is not revealed until the litigants enter the courtroom to argue their appeal.<sup>54</sup> However, it is directed to the judge who is the “target” of the motion as was the case when one of the parties sought to recuse Bastarache J. in the *Arsenault-Cameron* language rights appeal.<sup>55</sup> In contrast, a motion for disqualification of a particular judge after judgment is made to the entire coram that heard the case. This contrasts with the American practice where both recusal and disqualification motions are made to the target judge.<sup>56</sup>

In practice, the threshold for a motion for recusal is lower than a motion for disqualification after the fact. This is best demonstrated by Iacobucci J.’s statement that “[v]ery few judges insist on sitting where they’re not wanted.”<sup>57</sup> Unlike the American practice where the recusal of one justice will leave a bench of eight and in effect make it harder for the appellant to obtain the five votes necessary to succeed on an appeal, recusal of a single justice (or two) will not result in an even number of justices hearing an appeal and the spectre of an evenly split bench. The Chief Justice will simply pair off the recused justice with another justice and assign the remaining seven to hear the case (or the Chief Justice may decide that only five justices — the minimum quorum — are necessary to the appeal). In any case, the inconvenience or discomfort

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<sup>54</sup> While the reasons for this practice have not been made explicit, it would appear to prevent the practice of targeting one’s written or oral arguments to a specific bench that will hear the appeal. The American practice is for all nine justices to hear each appeal unless one is recused.

<sup>55</sup> See *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, [1999] S.C.J. No. 75.

<sup>56</sup> Compare *Laird v. Tatum*, 409 U.S. 824 (1972) (motion to disqualify Rehnquist J. after judgment rendered) and *Cheney v. U.S. District Court*, 18 March 2004 (motion to recuse Scalia J. before case was heard).

<sup>57</sup> Transcript of Proceedings, *supra*, note 27, at 40.



caused by recusal is minimal which underscores Iacobucci J.'s point and also supports the practice of "when in doubt, recuse oneself."

(c) *The Bar*

As officers of the Court, counsel appearing before the Supreme Court have a duty to protect the integrity of the administration of justice. *Wewaykum* raised the issue of counsel's duty to disclose the potential for reasonable apprehension of bias. An undertone of the disqualification motion is that counsel for Canada should have discovered Binnie J.'s connection to the file earlier and should have disclosed the issue to the Court. In addition, from the transcript of the hearing of the motion, it is apparent that some members of the Court were perturbed by the possibility that counsel for one of the other parties may have had reason to know about Binnie J.'s past involvement with the case but failed to disclose it.<sup>58</sup>

The *Supreme Court Act* enshrines the principle that all persons who appear before the Supreme Court are officers of the Court.<sup>59</sup> As officers of the Court, lawyers have a duty to treat the Court with candour, fairness, courtesy and respect.<sup>60</sup> This must be balanced with the lawyer's duty as advocate to represent the client "resolutely, honourably and within the limits of the law."<sup>61</sup> However, during the hearing of the disqualification motion, Iacobucci J. clearly articulated that he thought that counsel owed a duty as officers of the Court to ensure "that the Court functions in as fair and impartial manner as possible."<sup>62</sup>

Lawyers appearing before the Supreme Court should be required to act with due diligence to ascertain and disclose potential grounds for a judge's disqualification. At present, no ethical rule or practice guideline requires a lawyer to take any steps to ascertain a potential conflict of interest or make the court aware of such an issue. In fact, the current

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<sup>58</sup> See Transcript of Proceedings in Court File No. 27641, 23 June 2003, at 5, 24-26 (*per* Major J.), and at 29 (*per* Bastarache J.).

<sup>59</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 24.

<sup>60</sup> See generally Canadian Bar Association, *Code of Professional Conduct*, chapter IX, Rule and commentary 1. See also Ontario Rule 4.01 and accompanying commentary.

<sup>61</sup> *Id.* See generally Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 2004), at 4-60.

<sup>62</sup> Transcript of Proceedings, *supra*, note 27, at 32 (*per* Iacobucci J.).

state may lead to the analogous situation where one of the parties and the judge know of some connection between the judge and the party but do not believe that a reasonable apprehension of bias exists so neither discloses it to the Court. However, the other party does not know about the issue and is left in the dark. If the other party discovers the connection between the judge and the party after judgment, he or she may have cause to complain that a reasonable apprehension of bias existed.<sup>63</sup> The proper course is to follow the suggestion of Iacobucci J. that counsel has a duty to at least turn its mind to the issue of possible reasonable apprehension of bias.<sup>64</sup>

When it comes to disclosure surrounding potential disqualification, it is difficult to argue with Brandeis J.'s adage that "sunshine is the best disinfectant."<sup>65</sup> The experience of *Wewaykum* demonstrates that it is better to err on the side of disclosure than on the side of keeping mute for fear of counsel embarrassing themselves or fear of alienating the Court.

#### IV. CONCLUSION

At the end of the day, *Wewaykum* is a case about constitutional responsibility: the responsibility of the bench, the responsibility of counsel and the responsibility of the legislature. This close call serves as a warning to all and demonstrates the need for all three constitutional partners to work together to protect the integrity of the system. *Wewaykum* demonstrates the problems that can arise when they do not.

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<sup>63</sup> These are the facts in *Finney v. Barreau du Quebec*, 2004 SCC 36 (Respondent Christina Finney argued, *inter alia*, that a reasonable apprehension of bias existed because of the trial judge's past connections to the corporate defendant, some individual defendants and several witnesses none of which were ever disclosed during the course of her trial). The Supreme Court did not address this issue.

<sup>64</sup> Transcript of Proceedings, *supra*, note 27, at 32.

<sup>65</sup> Louis D. Brandeis, *Other People's Money and How the Bankers Use It*, Richard M. Abrams, ed. (New York: Harper and Row, 1967), at 62.

