RECUSAL OF A JUDGE FOR BIAS AFTER JDR/
RECUSAL OF A CASE MANAGEMENT JUDGE

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Overview

The *Rules of Court*, Alta Reg 124/2010 ("*Rules*") and case law from the Court of Appeal deal with concerns of bias in the specific context where a judge has conducted a JDR with the parties. These authorities indicate that there are limited circumstances in which it will be appropriate for a judge to continue to perform adjudicative functions in the file subsequent to the JDR. This is particularly the case where the issue on which the judge is called to adjudicate is an issue that was already canvassed during the JDR.

A number of decisions have been rendered by Alberta courts dealing with applications for recusal of a case management judge. These cases establish that the approach in a case management context is the same as in any other context, and that the applicable test for apprehension of bias is "whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would think it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly"[i]. These cases suggest that the threshold for finding an apprehension of bias is high, and that judges should not accede to every application for recusal brought by a disgruntled party, but in fact have a responsibility to remain seized of a matter unless a legitimate basis for disqualification exists.

Disqualification of Judge after JDR

The new *Rules of Court*, Alta Reg 124/2010, Rules 4.17 *et seq*, set out the rules governing JDR processes. In particular, Rule 4.21 reads as follows:

> "4.21(1) **The judge facilitating a judicial dispute resolution process in an action must not hear or decide any subsequent application, proceeding or trial in the action without the written agreement of every party and the agreement of the judge**.

> (2) The judge facilitating a judicial dispute resolution process must treat the judicial dispute resolution process as confidential, and all the records relating to the process in the possession of the judge or in the possession of the court clerk must be returned to the parties or destroyed except
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> > (a) the agreement of the parties and any document necessary to implement the agreement, and
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> > (b) a consent order or consent judgment resulting from the process.
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> (3) The judge facilitating a judicial dispute resolution process is not competent to give evidence nor compellable to give evidence in any application or proceeding relating to the process in the same action, in any other action, or in any proceeding of a judicial or quasi-judicial nature." (Emphasis added)

Prior to the new *Rules*, JDR processes were governed by the *Guidelines for Judicial Dispute Resolution* ("*Guidelines*") issued by the Alberta Court of Queen's Bench, which provided as follows at paragraphs 8 and 9:

> "8. The process is confidential. Statements made by counsel or by the parties are confidential and without prejudice and cannot be used for any purpose or referred to at trial, should the matter proceed to trial. After judicial dispute resolution, all briefs, submissions, notes and papers in the judge's possession will be destroyed.
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> 9. **Unless the parties consent, the judge will not hear any applications or the trial of the matter. The judge will not discuss the judicial dispute resolution process with the trial judge, should the matter proceed to trial**." (Emphasis added)

Thus the new *Rules* require not only that the parties give consent for the judge administering the JDR to adjudicate on subsequent matters, but also that the consent be provided in writing.

Paragraph 9 of the *Guidelines* has been interpreted on two occasions by the Court of Appeal. In *White* v. *White*, 2003 ABCA 358, 346 A.R. 51, the judge had retained jurisdiction, after issuing judgment at trial, in relation to a possible review of access arrangements and to provide advice and directions to the wife if child support was not paid. The parties did in fact meet with him, without counsel, to attempt to resolve outstanding issues, and the wife had a second meeting with the judge, which the husband declined to attend. The husband subsequently filed an application

for variation of child support and increased access, in response to which the wife sought an order permitting her to withhold the final matrimonial property payment and to deduct amounts therefrom as security against payment of child support. The judge's rulings on those matters were appealed by the husband on grounds of bias. The Court *per curiam* allowed the appeal with the following reasons:

> "[14] We have no doubt whatsoever as to the fairness and impartiality of the learned chambers judge. He is to be commended for attempting to assist the parties to resolve their outstanding issues in this difficult litigation. Although his meeting with the parties in the absence of counsel in April 2001 was directed to that purpose, an examination of the record persuades us that the meeting in question was in the nature of a mediation. Its purpose was to attempt to resolve some of the outstanding issues between the parties by way of agreement. **Judicial Dispute Resolution may often require a judge to adopt a posture that, if assumed in one's capacity as a trial judge, might well result in reversible error. Trial judges do not enter the fray. A judge engaged in J.D.R. may do precisely that.** Indeed, he or she may well exhort the parties and, on occasion, resort to gentle criticism in order to facilitate a fair compromise of disputed issues.
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> [15] The meeting between the chambers judge and the Respondent in the absence of the Appellant was also directed to that purpose, as were the post-adjudication meetings of the chambers judge recited above. **All were well-intentioned, but we are bound to say incompatible with the adjudicative role**.
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> [16] **In such circumstances, the consent of the aggrieved party, notwithstanding paragraph 9 of the Guidelines, will not have a curative effect. The obligation to recuse lies with the judge regardless of whether or not the litigants consent**." (Emphasis added)

The effect of the parties' consent for the judge to continue adjudicating despite involvement in a JDR was again addressed in *L.N.* v. *S.M.*, 2007 ABCA 258, 412 A.R. 232. In that case, the parties had participated in a JDR process which led to an agreement placing custody of their child with the father, and stipulating that the judge would remain seized of the matter. The mother subsequently sought modification to that arrangement, and a trial of the matter was heard by the same judge who had conducted the JDR. He rendered a final order placing custody with the mother. Berger J.A. allowed the father's appeal, providing lengthy commentary and concluding that the judge's involvement in the JDR process made it inappropriate for him to act as trial judge. He stated:

> "[31] **A judge's role at JDR is very different than that of an adjudicating judge. The substance of negotiations at a JDR never come before a trial judge. Trial judges do not caucus with the parties. Trial judges are never privy to offers of settlement made at the JDR before they adjudicate on the merits**. Moreover, when the JDR is arranged, counsel are reminded that "the non-binding opinion of the [JDR] judge that may be rendered is strictly confidential. ... It will not be discussed with a trial judge." **At a JDR, the judge deals directly with the parties. The judge's role is to facilitate settlement negotiations and resolve outstanding issues. The JDR judge will converse with the litigants and may express his opinion regarding the competing positions.**
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> [32] There will be an incomplete record of the JDR for appeal purposes. The aggrieved litigant who wishes to rely upon certain representations at JDR, which arguably led him or her to consent to the same judge presiding at trial, would ordinarily be unable to do so. (I allow for an exception in this case; see para. 40). In such circumstances, any such consent would be incapable of meaningful appellate review. Although it might be argued that a judge can be relied upon to recuse himself if that which took place at the JDR gives rise to a reasonable apprehension of bias, judges do err, and the lack of a record of what transpired at the JDR would not be available for any purpose to the losing party.
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> [33] It follows that the principles set out in *White v. White* are not confined to the facts of that case. *White* establishes a rule of broader application when contested issues at trial were earlier canvassed by the same judge at JDR.
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> […]
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> [37] I recognize that the JDR process has become a valuable tool in expedited dispute resolution within the formal framework of the administration of justice. As such, its use and the practices and rules around it should develop with that purpose in mind, but without sacrificing the integrity of trial process.
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> [38] The principled exclusion of JDR judges from the trial role, premised upon the confidentiality of JDR discussions in furtherance of candour and transparency, enhances the efficacy of the process and facilitates the settlement of disputes. **I am persuaded that trial judges should not be privy to such discussions, even with the consent of the parties, because to so permit diminishes the efficacy of JDRs and inevitably raises the spectre of an apprehension of bias in subsequent trial or contested chambers proceedings**." (Emphasis added)

In the process of coming to this conclusion, Berger J.A. also acknowledged the following circumstances in which, exceptionally, it may be acceptable for a JDR judge to subsequently act in an adjudicative role in the same file. Note, however, his caveats concerning the necessity for

unequivocal consent by the parties, and the avoidance of adjudicating on issues already canvassed in JDR:

> "[34] In so holding, **I do not say that there will not be situations where a judge will be invited to conduct a JDR with respect to a discrete number of issues with the consent of the parties and then preside at a trial where the remaining issues in dispute, which were not discussed at the JDR, are adjudicated**. But even in those cases, a judge must be very careful to consider whether there would be an appearance of bias and, accordingly, must ensure that the matter is thoroughly canvassed and an express, informed consent obtained. Judges, litigants and their counsel must understand that an implied waiver of apprehension of bias in these circumstances will not immunize the trial verdict from appellate intervention.
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> [35] **I also acknowledge that there will be situations where a JDR judge may stay involved in non-trial matters following the JDR.** But they should be confined to non-contentious issues like signing an order reflecting the settlement agreement. It may also be that on a small outstanding issue the parties will consent to the JDR judge making a decision to finalize a settlement. Any such consent should be clear and unequivocal; it should particularize with care the matters to which the consent applies.
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> [36] **I recognize that there are situations where it is advantageous and desirable for the JDR judge to be the trial judge. Particularly in family law situations, the litigants cannot always afford the ideal level of procedural protection. They may have developed a comfort level with the JDR judge, or they may recognize that the factual knowledge that the JDR judge has acquired will considerably streamline the final resolution of matters still in dispute.** In my opinion, if such issues were unsuccessfully canvassed at the JDR, the JDR judge should not adjudicate such issues at trial or in subsequent contested chambers applications. Instead, if the parties repose confidence in the JDR judge, it is certainly open to them to continue the JDR process. Surely, the JDR regime is flexible enough to allow the JDR judge to hear *viva voce* testimony from witnesses and to provide the parties with the benefit of his or her opinion which the litigants may agree will bind them and will form the basis of a consent order. Should the parties so elect, they will no doubt appreciate that the JDR judge's pronouncement remains part of the JDR process and will not be appealable." (Emphasis added)

Thus, in Berger J.A.'s opinion, it is generally not appropriate for a JDR judge to subsequently act as adjudicating judge in the same matter. Exceptions, in his view, are likely limited to adjudication of issues not canvassed during the JDR, or to minor, non-trial matters. In all cases, the parties' consent must be clear and unequivocal, and the judge must give careful consideration to whether the circumstances give rise to an apprehension of bias.

The decision in *White* v. *White* was also applied in *B. (T.P.)* v. *Alberta (Director of Child Welfare)*, 2005 CarswellAlta 2728 (Q.B.). In that case, Phillips J. vacated a permanent guardianship order made by a provincial court judge who had also conducted JDR proceedings concerning temporary guardianship of the same children. In rendering judgment, Philips J. took a strict view of the rules, in keeping with *White*:

> "3 Following *White v. White* [2003 CarswellAlta 1732 (Alta. C.A.)], **it is clear the Provincial Court judge should have disqualified herself from the hearing, given that she had conducted a Judicial Dispute Resolution between the parties less than a year prior to trial**, albeit the JDR was in relation to a Temporary Guardianship Application concerning the same children and parties as the Permanent Guardianship Application from which this appeal arises.
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> 4 The guidelines for a JDR in Provincial Court are similar to those as set out in Queen's Bench. In that regard, it is represented to the parties at the outset of a JDR that the judge conducting the JDR shall not hear any application or the trial of the matter.
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> 6 In this case, the items discussed at the JDR are unknown, but the transcript of the trial indicates that the Department was pursuing a Permanent Guardianship Order, which the Appellant mother was advised of prior to the JDR. It therefore follows the same issues that would have beer [sic] discussed at the JDR were likely the same ones before the Provincial Court judge at trial relating to the Permanent Guardianship Application
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> 7 **It matters not that the Provincial Court judge did not recall what had gone on at the JDP [sic], or that she acted with fairness and impartiality.** […]
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> Furthermore, it matters not that this matter was not raised with the Provincial Court judge until the third day of the trial. As pointed out in paragraph 16 of *White v. White*: "consent of the aggrieved party will not have a curative effect". So too in this case, any failure of the Appellant mother to address the JDR issue with the court at the outset of the trial, arguably amounting to acquiescence on her part, will not in my view have any curative effect on this case whatsoever."

Thus, these cases take the position that the judge's roles in JDR and adjudicative contexts are essentially incompatible, and a judge having acted in a JDR capacity should not then go on to adjudicate matters in the same file. The exceptions to this rule arise where the JDR and

adjudicated issues are sufficiently distinct to avoid any apprehension of bias, or where the parties have given clear and enlightened consent to the continued involvement of the JDR judge.

Disqualification of a Case Management Judge

A succinct statement of the applicable test on an application for recusal or disqualification of a judge is set out in *Point on the Bow Development Ltd.* v. *William Kelly & Sons Plumbing Contractors Ltd.*, [2005] A.J. No. 641, 2005 ABQB 368**,** affirmed 371 A.R. 395, 2005 ABCA 310. In that decision, Lutz J. recused himself from rehearing an application for contempt brought within case management, after his initial ruling on the application was overturned on appeal and sent back to him for a new decision. He stated:

> "[5] **The criterion for recusal is the reasonable apprehension of bias. The test for reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would think it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly**. […] Our legal system is predicated on a judge's open-minded consideration of each case, without predisposition to decide an issue or cause in a certain way. There is a strong presumption of judicial impartiality. The focus of the reasonable apprehension of bias test is not bias in fact but rather bias as perceived or apprehended by a reasonable person properly informed.
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> [6] On June 13, 2003, I found Point on the Bow Development to be in contempt based on many of the same allegations that will be raised by William Kelly & Sons Plumbing Contractors Ltd. today. I am mindful that the reasonable apprehension of bias test, a highly fact-specific test, is to be applied with a view to ensuring that justice must be seen to be done. Thus, I am prepared to find, on the facts, that a reasonable person properly informed could perceive me to be predisposed to deciding the contempt application in a certain way. For these reasons, I recuse myself from hearing the contempt application." (Emphasis added)

A more detailed discussion of the test for apprehension of bias was also set out by Veit J. in *Broda* v. *Broda*, 285 A.R. 201, 2000 CarswellAlta 1464, affirmed 286 A.R. 120, 2001 CarswellAlta 865:

> "18. The leading case on reasonable apprehension of bias is *S (R.D.)* in which Cory J., speaking for the Supreme Court of Canada defined "impartiality" as "a

> state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions". Conversely, he defines "bias" as "a state of mind that is in some way predisposed to a particular result, or that is closed with regard to a particular issue".
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> 19 As broad as the concept of bias may be, it does not extend to include every slight, as the British Columbia Court of Appeal noted in *Middelkamp*:
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> > . . . bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence, nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism.
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> 20 In *S. (R.D.)*, the Supreme Court of Canada also approved the test found in *Middelkamp* for deciding if there is a reasonable apprehension of bias. Referring to that decision, and to the existing case law, Cory, J. said:
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> > This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case . . . Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold".
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> 21 **This test has been described as having established a "high" threshold for a finding of perceived bias**: *Sorger*. Bastarache J., declining to recuse himself from a case stated: **"The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood or probability of bias must be demonstrated."** (Emphasis added)

In that case, Veit J. concluded that the complaints of the husband, a self-represented litigant, did not amount to a reasonable apprehension of bias, and therefore declined to recuse herself. In doing so, she warned against judges recusing themselves too easily, and asserted a responsibility for judges to remain seized of a matter unless a legitimate basis for recusation exists. She stated:

> "26 It would be natural for members of the public to think that, whenever an allegation of bias is made against a judge, that judge should step aside. The Court of Queen's Bench of Alberta has many judges at its disposal, and it would appear to

> be easy to replace any one judge with another. When a motion for recusal is made, the question then might arise: Why does a judge even have to think about it, why not just disqualify herself?
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> 27 The concern of every judge against whom an allegation of bias is made is reflected in the words of McEachern, C.J.B.C. in *G.W.L. Properties Ltd.* [*G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada* (January 21, 1992), Doc. Vancouver C900884 (B.C. S.C. [In Chambers])]:
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> > A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure that there is no appearance of unfairness. **That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to ensure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or price**.
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> 28 See also the comments of Mason J. in *L. (J.R.), Re*:
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> > Although it is important that justice must be seen to be done, **it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide in their favour**." (Emphasis added)

This decision was confirmed on appeal (*Broda* v. *Broda*, 286 A.R. 120, 2001 CarswellAlta 865 (C.A.)), with the Court *per curiam* providing the following pointed commentary:

> "16 We will refer to one specific contention. The mere fact that a party has lost some motion or suit before a judge (without a jury) does not entitle that litigant to be thereafter free of that judge. That is so both in later suits of a broadly similar nature, and in later motions in the same suit. Any other rule would render civil and criminal litigation impossible in several situations."

A similar view was expressed by Romaine J. in *Freyberg* v. *Fletcher Challenge Oil and Gas Inc*., 2006 ABQB 614, 400 A.R. 11 (overturned on appeal without addressing apprehension of bias, 2006 ABCA 336, 401 A.R. 30):

> "[45] For there to be a reasonable apprehension of bias, the party alleging it must establish more than a discomfort or disagreement with what has been decided previously by the judge, more than a desire for what he or she perceives could be a judge more sympathetic to that party's point of view, more than a "clean slate" to present the remainder of the case. The test is what an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude."

The Supreme Court decision in *R.* v. *S. (R.D.),* [1997] 3 S.C.R. 484, cited by Veit J. in *Broda*, also emphasized that the threshold for a finding of bias or apprehension of bias is high. Cory J. for the majority commented as follows:

> "112 The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at pp. 394-95:
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> > I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. **The grounds for this apprehension must, however, be substantial** and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]
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> Nonetheless the English and Canadian case law does properly support the appellant's contention **that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough**. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.); *Bertram*, *supra*, at p. 53; *Stark*, *supra*, at para. 74; *Gushman*, *supra*, at para. 30.
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> 113 Regardless of the precise words used to describe the test, **the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high**. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.
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> 114 The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, *supra*, at p. 28; *Lin*, *supra*, at para. 30. Further, whether a

> reasonable apprehension of bias arises will depend entirely on the facts of the case." (Emphasis added, underlining in original)

The decision in *Dahlseide* v. *Dahlseide*, 2011 ABQB 696, [2011] A.J. No. 1249 represents an example of a case in which the threshold for apprehension of bias was considered to be met. That decision concerned a case management judge who, in his former capacity as Minister of Justice, had exchanged correspondence with the husband/applicant in relation to the same family law dispute over which he was presiding in case management. In addition, the judge as Minister of Justice oversaw the MEP program that had investigated the husband, and oversaw the operation of the Domestic Violence Court where the husband had filed complaints against his wife and mother-in-law, and felt he got a raw deal. The husband also perceived the judge to be biased against him more generally as a self-represented man in a family law dispute. Stevens J. did recuse himself, but took pains to distinguish those grounds which he accepted as valid from those which he characterized as mere "angry objection":

> "[12] In my opinion, the fact that I do not recall Mr. Dahlseide and/or Ms. Kaminski and their issues which may have been before myself and employees of Alberta Justice is irrelevant to the issue of apprehended bias.
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> [13] I conclude that grounds one, two and three of apprehended bias as outlined above are reasonable. In other words, a reasonable person might feel an apprehension of bias in the circumstances of this case. With respect to ground one, based on my review of the correspondence Mr. Dahlseide offered up, it appears the subject matter included what may be details of the parties' matter before this Court. It also appears I responded to Mr. Dahlseide on at least one occasion. Turning to ground two, if the matter of support was being handled by Maintenance Enforcement Program, and I have no reason to believe otherwise, then many of the particulars of the support matter would have been on that file. Finally, on ground three, Crown Prosecutors are agents of the Attorney General.
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> [14] Accordingly, I will recuse myself as case management judge.
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> [15] I reject Mr. Dahlseide's other grounds of apprehended bias. Generally, I would describe Mr. Dahlseide's other grounds as falling into the category of "angry objection" referred to in paragraph 23 of the *L.M.B.* [*Broda*] decision.
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> [16] Specifically, I did not set up the Domestic Violence Court as a pilot project in Calgary. It was in existence when I became Minister of Justice and Attorney General. That Court's sole purpose is not to prosecute ***men*** in domestic violence

> situation. The work of that Court speaks for itself, particularly in terms of reducing the recidivism rates of offenders."

By contrast, *Ritter* v. *Hoag*, 2003 ABQB 387, 335 A.R. 185 is an example of a case where the threshold for recusal was not met. In that case, the applicant raised numerous grounds of alleged bias against the case management judge, including: past associations of the judge with one of the applicant's witnesses, and with a lawyer representing the applicant in a related case (paras. 6-7, 33-36); several rulings made by the judge which were unfavourable to the applicant; and statements made by the judge concerning the applicant's credibility (paras. 49-52). Burrows J. cited the test for apprehension of bias as articulated in *Broda*, and rejected all grounds raised by the applicant, finding that an informed person would not view any of the circumstances raised as demonstrating an apprehension of bias.

A similar conclusion was reached in *Ibrahim* v. *Giuffre*, (2005) 95 A.C.W.S. (3d) 865, 258 A.R. 319 (AB QB)**,** appeal dismissed 2000 ABCA 112, 255 A.R. 388 (CanLII), although that case involved a trial judge rather than a case management judge. Burrows J. in that case declined to recuse himself from hearing an upcoming trial despite having a past association with an important witness for the defence, and despite the fact that another judge had already recused himself from the case due to a relationship with the same witness. In refusing to withdraw from the case, Murray J. noted that his relationship with the witness was not as close as that of the previous judge, and observed as follows:

> "[13] As Mr. Justice Cory pointed out in the *R.* v. *R.D.S.* decision the reasonable person must be an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background must be apprized also of the fact that impartiality is one of the duties that judges swear to uphold. His Lordship also pointed out that the grounds for an apprehension of bias must be substantial. The submissions put forward, to my mind, fall well short of the requirements enunciated by the courts."

The question of whether a case management judge should be treated differently from a trial judge with respect to allegations of bias was briefly addressed in *Broda*, with Veit J. concluding that "the test for apprehension of bias that is used for trial judges should also be used for case

management judges" (at para. 29). This view appears to be supported by the number of cases, discussed above, in which that test was in fact applied to a case management judge.

In addition, Veit J. cited an Ontario judgment, *Control & Metering Ltd*. v. *Karpowicz*, 1994 CarswellOnt 487, 23 C.P.C. (3d) 275 (Ont. H.C.J.), in which MacDonald J. concluded that the enactment of legislation creating the case management process - in which it is deliberately intended that multiple applications in the same file should be decided by the same judge – means that there is *prima facie* no apprehension of bias arising merely from the case management judge's accumulated knowledge of the file. MacDonald J. stated:

> 21 Taking into account the purpose of the case management rules expressed in r. 1.02, I am of the opinion that the formulation of r. 3.01(1) by the Civil Rules Committee with the approval of the Lieutenant Governor in Council and the authority of the Legislature decrees that the hearing of all motions in a managed case by one judge is *prima facie* fair and just. Further, when it is recognized that r. 31.01(3) permits a motion to be made in a managed case without supporting material and that r. 3.01(6)(*g*) empowers the case management judge to do what is necessary to carry out the purpose of case management, **it is clear that the case management rules permit the judge to take into account in motions the accumulated knowledge of the case gained from, and the approach imparted by prior involvement in it**.
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> 22 Early involvement of one judge in a managed case is to ensure early commencement of the process of resolving the ultimate issues. It is an issue of economy for both the litigants and the court, a recognition of finite resources and the public interest in more efficient justice. There can be no doubt that the most significant reasons for any perception that courts are remote and inaccessible in civil cases are the related issues of delay and the cost of litigation. Case management is directed to overcoming these problems in order to make this court more accessible, thereby enhancing public confidence in the way justice is administered.
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> […]
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> 34 Viewed from a different vantage point, the will of the Legislature and the Lieutenant Governor in Council should be taken fully into account in determining whether any bias apprehended in implementing their will is reasonable. In my opinion, this is clearly so where, as here, the Lieutenant Governor in Council and the Civil Rules Committee (with the authorization of the Legislature) have expressed the purpose to which the case management rules are directed, thereby defining the way in which these rules should operate upon the rights of litigants.

[…]

37 The applicant concedes that the case management judge was properly within the ambit of her discretion in the findings which she made in disposing of the injunction motion. However, it is the applicant's position that these findings, and her opinion that fiduciary duties are not applicable to Karpowicz will inevitably be applied by her in the disposition of subsequent motions, so that a reasonable apprehension of bias arises**. In my opinion, this accumulated knowledge of the case and this uniformity of approach to it are essential components of the case management system,** for the purpose of creating momentum towards resolution before trial or failing that, for the purpose of narrowing the issues to be tried. This accumulated knowledge and uniformity of approach are no different in their impact upon the rights of a litigant or upon the appearances of justice than a commissioner pursuant to the *Securities Act* (such as in *W.D. Latimer Co. v. Bray* (supra)) or a bencher pursuant to the *Law Society Act* (such as in *Law Society of Upper Canada v. French* (supra)) participating in an investigation, determining that proceedings should be instituted and then sitting on the adjudication of the proceedings. I note as well the decision of the Saskatchewan Court of Appeal in *Collins v. Estevan Roman Catholic Separate School Division No. 27*, [1988] 6 W.W.R. 97, where it was held that as long as the degree of pre-judgment does not go beyond the powers and duties imposed by the statute, that pre-judgment cannot give rise to a reasonable apprehension of bias.

38 Such aspects of pre-judgment are quite different from a closed mind. While the issues in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* (supra) were different, I am of the opinion that the test for disqualification enunciated by Sopinka J. for the majority at p. 1197 S.C.R. is appropriate here as well. In that case, it was held that a member of a municipal council was not disqualified by reason of bias unless he or she had prejudged the matter to be decided to the extent of being no longer capable of persuasion. **In the case at bar, given the purpose of the case management rules, the public interests they address and the discretionary powers they give to the case management judge, I am of the opinion that the applicant must establish an apprehension, reasonable in the circumstances, that the case management judge's views are such that she is no longer capable of being persuaded by evidence to be filed (if any) and legal arguments to be raised in subsequent motions, in order for her to be disqualified**. **The apprehension that she may well take into account in subsequent motions the views of the facts and legal issues which she formed in prior motions is well founded. That is what the case management rules mandate. That cannot, however, give rise to an apprehension of bias sufficient to disqualify the judge because that is precisely what the rules mandate.**

39 I therefore conclude that when a person, informed about the case management rules, the public interests served by them and the actions of this case management judge, considers all matters reasonably, including the right to a trial

> before a different judge, there can be no apprehension of bias. I note in particular that an even minded appraisal of the judge's findings in the injunction motion shows that she is open to arguments favouring the applicant. Karpowicz was disbelieved, he was enjoined, he was ordered to reimburse the applicant for losses sufficiently proven. The motion is therefore dismissed." (Emphasis added)

However, it has also been held that the determination of whether a reasonable apprehension of bias arises may turn on the particular language used by judge during previous interactions. This was the case in *Sandboe* v. *Coseka Resources Ltd*., 1988 CarswellAlta 253, 94 A.R. 330 (C.A.), where the Court *per curiam* held that certain frank remarks of the judge, made during a pre-trial conference, could be construed by reasonable persons, fully informed, as raising an apprehension that the judge might not decide the trial impartially. The Court stated:

> "We reached this conclusion with some regret. We observe firstly that the words complained of were spoken during a pre-trial conference. That is a procedure which has been quite successful in achieving the settlement of all, or at least some, of the issues in dispute in many cases. It has become an integral and useful part of the trial process in Alberta and in many other jurisdictions. A pre-trial conference is clearly a time for blunt speech. A judge conducting it may, and often should, make clear and frank expressions of opinion about a position taken by one or the other of the parties or even about a proposed witness. **Of course, if a judge feels obliged to use terms which might raise an apprehension that thereafter he or she might be perceived as having a difficulty in deciding impartially, the judge should not take further part in the case once the pre-trial conference is concluded**." (At p. 3, emphasis added)

END

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[i] See *Point on the Bow Development Ltd*. v. *William Kelly & Sons Plumbing Contractors Ltd*., [2005] A.J. No. 641, 2005 ABQB 368**,** affirmed 371 A.R. 395, 2005 ABCA 310, para. 5.