


The Recusal of Administrative Judges

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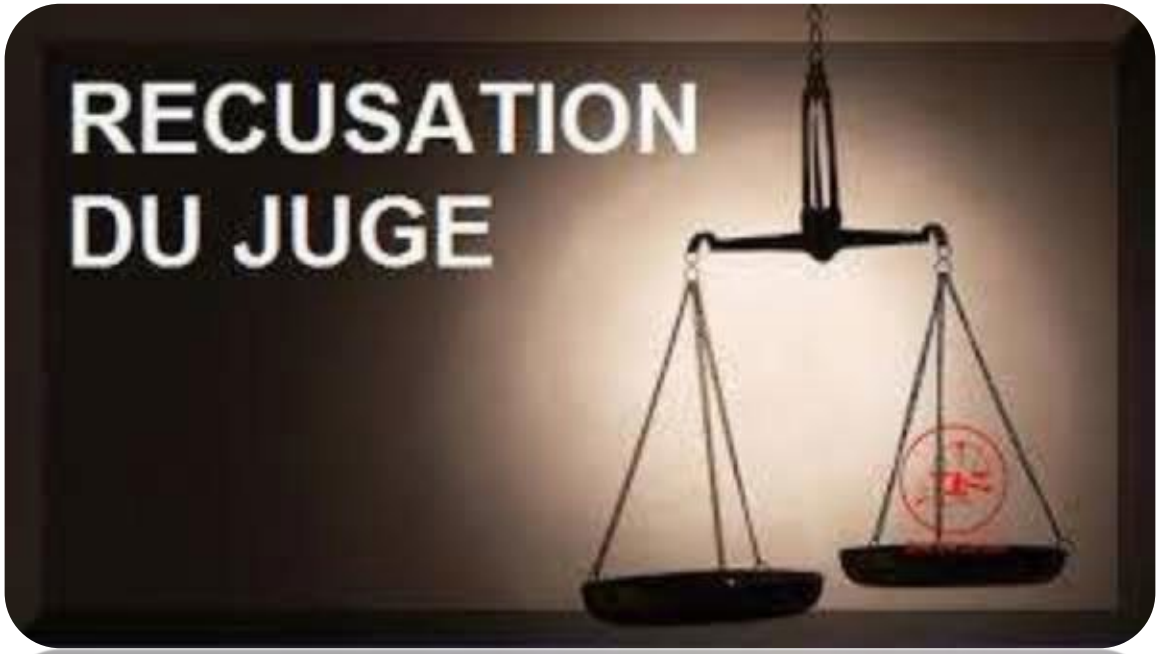
Régie de l'énergie Québec



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Presentation plan

1- The legal framework, the main principles

2- A few cases

3- A decision-making guide for recusals

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Recusal?

Recusal is the procedural issue raised by a party who suspects a judge of bias towards one of the parties or litigants without challenging the jurisdiction of a court. (Ooreka)

The purpose of this legal institution is to sanction a likelihood or at least an **appearance of bias on the part of the judge in a particular dispute** by ensuring that the judge cannot hear the case or must cease to hear it. (Source: Collection du Barreau)



The core values of the judiciary

The Supreme Court, in Ruffo (2005 QCCA 1197), identified these values:

- **Judicial Independence:** adoption of high standards of conduct, free from outside influence;
- **Integrity**: conduct beyond reproach in the eyes of a reasonable, impartial and informed person;
- **Due Diligence**: reasonable promptness, which is intended to preserve and enhance the knowledge, skills and qualifications required for judicial office;
- **Equality:** awareness of the particularities and distinctions of minority and/or vulnerable groups;
- **Impartiality**: reduction of the potential for conflicts of interest (and thus recusal).



The duties of judges

In R. v. S. (R. D.), 1997 SCC 324, the Supreme Court stated that:

- Impartiality is a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions;
- **Bias** denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues;
- The requirement for neutrality does not require judges to discount their life experiences;
- True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind;
- The judge must treat all witnesses equally.



Provisions relevant to recusal (C.C.P.)

The relevant provisions of the Code of Civil Procedure are **sections 201 to 205**.

- Use of the preliminary provision of the CCP since administrative tribunals are not, strictly speaking, part of the definition of judicial tribunals included in its section 8.

(Chamblais construction v. Garantie construction résidentielle, 2019 QC OAGBRN 127893 at par. 19-20).

201. A judge who considers that one of the parties may have serious reasons to question the judge's impartiality is required to declare as much to the chief justice or chief judge without delay. In such a case, the chief justice or chief judge designates another judge to continue or try the case and informs the parties.

A party that has serious reasons to question the judge's impartiality must declare as much without delay in a written statement notified to the judge and the other party. If the judge does not withdraw from the case within 10 days after the notification, a party may make an application for recusation. A party may, however, waive the right to recuse.

Statements and any other document relating to the recusation are filed in the record.



Provisions relevant to recusal (C.C.P.)

- **202.** The following situations, among others, may be considered serious reasons for questioning a judge's impartiality and for justifying the judge's recusation:
- (1) the judge being the spouse of one of the parties or of the lawyer of one of the parties, or the judge or the judge's spouse being related or connected by marriage or civil union to one of the parties or to the lawyer of one of the parties, up to the fourth degree inclusively;
- (2) the judge being a party to a proceeding pertaining to an issue similar to the one before the judge for determination;
- (3) the judge having given advice or an opinion on the dispute or having previously dealt with the dispute as arbitrator or mediator;
- (4) the judge having represented one of the parties;
- (5) the judge being a shareholder or an officer of a legal person or a member of a partnership or an association or another group not endowed with juridical personality that is a party to the proceeding;
- (6) a serious conflict existing between the judge and one of the parties or the lawyer of one of the parties, or threats or insults having been uttered between them during the proceeding or in the year preceding the application for recusation.



Provisions Relevant to Recusal (C.P.C.)

203. A judge who has an interest or whose spouse has an interest in a case is disqualified and cannot hear the case.

204. An application for recusation is notified to the judge and the other parties on the expiry of 10 days after notification of the statement.

If no statement was made, a party may apply for recusation at any stage of the proceeding, provided it shows that it has been diligent. The application may be made orally during the trial, in which case the reasons given are recorded in the minutes of the hearing.

If the application for recusation is against the sole judge assigned to sit in the district where the proceeding has been brought, the court clerk immediately informs the chief justice or chief judge.



Provisions relevant to recusal (C.C.P.)

205. The application for recusation is decided by the judge seized of the case. The decision may be appealed by leave of a judge of the Court of Appeal.

If the application is granted, the judge must withdraw from the case and abstain from sitting. If the application is dismissed, the judge continues to be seized of the case.

The court clerk advises the chief justice or chief judge of any case in which the trial is postponed because the judge has decided to withdraw from the case.



Provisions relevant to recusal (ARAJ)

The Act respecting administrative justice contains special provisions relating recusal (CQLR c J-3):

143. A member who has knowledge of a valid cause for his recusation must declare that cause in a writing filed in the record and must advise the parties of it.

144. A party may, at any time before the decision and provided he acts with dispatch, apply for the recusation of a member seized of the case if he has good reason to believe that a cause for recusation exists.

The application for recusation shall be addressed to the president of the Tribunal. Unless the member removes himself from the case, the application shall be decided by the president, by the vice-president responsible for the division concerned or by a member designated by either of them.



Instigating a recusal request?

- The **judge;**

"A judge who knows of a reason for recusal must inform the parties without delay so that they are not put in the delicate position of having to decide, in the presence of the judge, whether to demand recusal." [Translation]

(Backman v. Canadian Imperial Bank of Commerce, 2004 QCCA 7273).

- A **party;**

"Recusal must be sought at the earliest opportunity and not when the outcome of the trial is known." [Translation] (Laniel v. Dompierre, 2011 QCCA 2089).

"The fact that the parties do not express a concern about the objectivity of the judge at trial waives the argument of bias on appeal." [Translation] (Boyer v. Loto-Québec, 2017 QCCA 951).



Burden of proof for recusal

- The onus is on the person alleging a **reasonable apprehension of bias** to present compelling evidence that, in regards to the circumstances of this case, a reasonable person might fear that the judge is no longer impartial;
- The evidence required to overcome this presumption must be rigorous since a **real likelihood of bias** must be established because mere suspicion is insufficient;
- The reasonable apprehension of bias must be based on specific facts and not on a hodgepodge of facts imagined, grossly exaggerated, or simply fabricated. (Droit de la famille – 17396, 2017 QCCA 353.)



Opening criteria for recusal

(i) A judge's impartiality is presumed;

(ii) A party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

(iii) The criterion of disqualification is the reasonable apprehension of bias;

(iv) The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

(v) The test for recusal is not met unless it is proven that an informed, sensible and reasonable person would be of the opinion that it is more likely (than not) that the judge, consciously or unconsciously, cannot rule in a fair and honest manner;

(vi) The test must demonstrate serious grounds for apprehension (fear); and

(vii) Each case must be analysed as a whole and based on specific facts.

(Wewaykum Indian Band v. Canada, 2003 SCC 45.)



Opening criteria: continued

Relevant decision: R. v. S. (R.D.), 1997 SCC 324.

- Where the decision-maker's bias is alleged, the test to be applied is whether the particular conduct raises a reasonable apprehension of bias;
- The apprehension of bias must be reasonable and made by a sensible and reasonable person who would ask himself/herself the question and take the necessary information on the matter;
- It is not necessary to establish that bias exists in fact because it is usually impossible to determine whether the decision-maker approached the matter with any real preconceived ideas;



Opening criteria: continued

- There is a dual objective element to this test: the person considering the allegation of bias must be reasonable, and the apprehension of bias must be reasonable in the circumstances of the case;
- The reasonable person must be a well-informed person, aware of all relevant circumstances, including the historical traditions of integrity and impartiality, and also aware that impartiality is one of the obligations that judges have sworn to uphold;
- The reasonable person is also expected to know the social reality underlying a given case, such as the extent of racism or gender bias in a given community.



The apprehension of bias

For there to be grounds for recusal, the **apprehension of bias** must:

- Be reasonable;
  - Be both a logical (with serious reasons) and objective apprehension that would be shared by a reasonable person in the same circumstances;
- Come from a sensible, well-informed person;
  - Be sensible, not fussy or scrupulous;
  - Be well-informed, having studied the issue, both thoroughly and realistically, free from emotion;
- Be based on sound reasons;
  - There may be a need to be more stringent depending on whether or not the proceedings will be recorded and the existence of a right of appeal.

(Droit de la famille – 1559, 1993 QCCA 3570.)



The judge's attitude

In order for a party to succeed in a recusal request on the basis of the judge's behaviour at trial, the Court of Appeal points out that the step is very high:

- Being abrupt, surly or caustic is not enough;
- Severity in the management of the case or proceedings does not in itself create the appearance of bias;
- There must be an actual accumulation equivalent to a violation of the right to be heard;
- As the Court of Appeal concluded, patience and fairness are certainly judicial virtues, but this does not mean impatience and abruptness are valid reasons for recusal.

(Association générale des étudiants de la Faculté des lettres et sciences humaines de l'Université de Sherbrooke v. Roy Grenier, 2016 QCCA 86)



Findings

Why is it so difficult to win?

- **The impartiality of a judge is presumed and this presumption is difficult to overturn;**
- **Serious cases of recusal are rare;**
- **The apprehension of bias alleged by the party seeking the recusal of a judge or administrative judge must:**
  - Be reasonable;
  - Come from a knowledgeable person, knowledgeable of all the facts, including the historical traditions of integrity and impartiality and the fact that judges have sworn to uphold this obligation;
  - Be based on sound reasons;
- **This burden of proof is difficult to meet since a true probability of bias must be established.**

Some cases of application

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Case 1: The judge's professional past

Blanchet v. LOKIA Lebourgneuf Inc., 2021 QCTAT 4857

The judge was previously the opposing counsel to the counsel for one of the parties prior to his/her appointment.

- An administrative judge cannot be dismissed on the sole ground that he/she was the opposing counsel to the counsel for one of the parties, even if the dispute between them was very tumultuous;
- To establish a reasonable apprehension of bias, the professional relationship between the judge and counsel of one of the parties must be recent and not distant;
- The recusal request is **denied**.



Case 2: The judge's professional past

Entreprises CAM construction Inc. v. Régie du bâtiment du Québec, 2020 QCTAT 4565

One of the parties was once the judge's immediate supervisor.

- There is no apprehension of bias that can be raised by the fact that the president of one of the parties in the litigation had once been the judge's immediate supervisor;
- A judge's identity and experience form an important part of who he/she is, and these two aspects do not compromise his/her neutrality or impartiality in his/her duties;
- The administrative judge's experience in the field relevant to the tribunal's activities is one of the selection criteria, and therefore his/her experience cannot give rise to a reasonable apprehension of bias;
- The recusal request is **denied**.



Case 3: The judge's professional past

Lafleur v. Syndicat du personnel administratif, technique et professionnel du transport en commun SCFP-2850-FTQ. 2021 QCTAT 5670

The judge was, prior to his appointment, a union counsel.

- Administrative judges sitting in this division of the tribunal have acquired professional experience in labour relations, representing employees, unions and employers, or working in labour and management circles. This does not mean that they are biased because of their professional experience;
- A judge's identity and experience form an important part of who he/she is, and these two aspects do not compromise his/her neutrality or impartiality in his/her duties;
- The recusal request is **denied.**



Case 4: The judge's professional past

Beaudoin and Foyer Rousselot, 2018 QCTAT 596.

The judge previously worked at the CNESST.

- The judge worked at the CNESST nearly 30 years ago;
- No specific evidence was presented demonstrating a continuing connection with the Commission prosecutor or a personal knowledge of the prosecutor involved in the case;
- The Commission is an unavoidable entity in cases that come before the Tribunal. It manages the occupational health and safety system and renders decisions before the Tribunal. It takes more than a mere reference to the administrative judge's professional past, especially after a 30-year period, to create a reasonable apprehension of bias;
- The recusal request is **denied.**



Case 5: The judge's professional past

Syndicat des professionnels en soins de Saint-Jérôme and Centre intégré de santé et de services sociaux des Laurentides, 2015QCCRT 387

The judge worked at the same firm as the counsel representing one of the parties.

- The Commission is a specialized tribunal, with decision-makers whose expertise was acquired precisely because of their experience prior to their appointment. Many of the prosecutors appearing before the judge are from the labour relations world. According to the case law, in order to establish a reasonable apprehension of bias, it is necessary that the professional relationship between the commissioner and the representative be recent and not distant;
- The professional relationship ended more than 15 years ago and the administrative judge had no friendship or personal relationship with the respondent's lawyer. This situation cannot be the source of a reasonable apprehension of bias,
- The recusal request is **denied**.



Case 6: The judge's professional past

Association québécoise des indépendants du pétrole v. Régie de l'énergie 2007 QCCS 679

- *"[...]*
- *After considering the facts presented by the applicants, Ms. Rozon informed you of the rejection of your recusal request by means of a statement attached to this letter.*
- *Given the nature of this statement, the Régie considers that your request for recusal and the rescinding of procedural decision D-2006-134 is now moot. In accordance with the practice in such matters, the Régie considers that Ms. Rozon's statements constitutes a complete response to your request (Arsenault-Cameron v. Prince Edward Island, [1999] 3 S.C.R. 851 and Hansraj v. Ao, 2004 ABCA 130 (CanLII).*
- *[...]" [Translation]*



Case 6: The judge's professional past

- As a result of this correspondence, AQUIP and Intragaz challenged Ms. Rozon's decision not to recuse herself by filing an **application for judicial review** with the Superior Court.

- The Court (the Honourable Daniel H. Tingley J.C.S.) then applied the test of reasonable apprehension of bias and concluded that an informed person who would study the issue in a thorough, realistic and practical manner, would not believe that, in all likelihood, Ms. Rozon, consciously or not, would not render a fair decision. In particular, the judge referred to the following Supreme Court decisions: *Wewaykum Indian Band* v. *Canada*, (2003) 2 S.C.R. 260, page 288 and *Committee for Justice and Liberty* v. *National Energy Board* (1978) 1 S.C.R. 369 on pages 394 and 395.



Case 6: The judge's professional past

The Superior Court thus applied the same test as that applicable to administrative judges subject to the ARAJ and to judges within the judiciary with respect to recusals.



Case 7: The *Audi alteram partem* rule

Unifor v. Nova Bus Inc., 2022 QCTAT 2026

The judge made his position clear before hearing the parties.

- The judge made it clear, even before hearing the parties, that he was convinced that a breach of the code had been committed and that the issuance of an interim order was necessary;
- The judge had made his decision prior to the start of the hearing and was not open to hearing the other party's arguments;
- The application for recusal is **allowed**.



Case 8: The judge's behaviour

Jean v. Syndicat québécois des employées et employés de service, section locale 298 (FTQ), 2021 QCTAT 5824

The judge was arrogant and impatient.

- The fact that the administrative judge interrupted the party, "refused" and "rejected" his explanations at the preparatory stage, before the start of the hearing when the discussion was about the nature of the remedy, the production of documents, the disclosure of evidence and the reasons for these requests do not reveal the administrative judge's bias or a reasonable apprehension of bias;
- Impressions based on an administrative judge's attitude are not sufficient to conclude bias;
- The recusal request is **denied**;



Case 9: The judge's behaviour

Nault-Legault v. Tétreault, 2021 QCTAL 13376

Apprehension of bias through the judge's case management decisions

- The administrative judge presiding at a hearing has a duty to manage the hearing and direct the hearing on relevant issues. Refusal to receive certain evidence cannot be the basis for a recusal request;
- The recusal request is **denied.**

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Decision Support Guide

Faced with an increase in recusal requests and differing attitudes by judges to such requests, the judges have developed a guide to help them make decisions.

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Decision Support Guide: Highlights

5. Procedure to follow

5.1. Before assignment to a case

The judge who knows of a serious reason for recusal that could prevent him/her from acting in a case shall notify the President in writing so that he/she may take it into account when cases are assigned.

5.2. Upon becoming aware of being assigned to a case.

The judge who is aware of a serious reason for recusal shall immediately notify the President in writing so that someone else can be assigned to the case. In these circumstances, the judge is not required to file a statement on record considering that the review of the application has not commenced.



5.3. During the processing of a case

A judge who identifies a serious reason for recusal in the course of processing a case shall file a statement informing the participants that he/she is recusing himself/herself by presenting the reasons and informing the President so that someone else can be assigned the case.

The judge faced with a situation that he/she considers to be a problem may, in the interest of transparency, agree to make a statement even though he/she feels that there are no serious grounds for recusal.



Decision Support Guide: Highlights

5.4. When filing a recusal request

The judge in question must rule on this request free from any outside influence. As previously mentioned, before making a decision, the judge may consult with the Director of the Legal Department or an external lawyer with the President's authorization.

He/she must then inform the President and file a statement (in the form of a decision) in which:

- He/she allows the recusal by recognizing the reason as sufficient to recuse himself/herself; or
- He/she denies this request with reasons.



Decision Support Guide: Highlights

The Régie Secretariat sends the participants the judge's statement, which constitutes a complete response to the recusal request.

Where the judge's statement has the effect of allowing the recusal request, the President shall assign someone else.

Where the judge's statement has the effect of denying the recusal request, that decision could potentially be appealed for judicial review by the person who made the request. As previously mentioned, in such an appeal, the judge cannot be compelled to testify, whether or not the alleged event occurred prior to his/her appointment.



Decision Support Guide: Highlights

Where an appeal for judicial review is brought against such a decision, the Régie shall retain the services of a lawyer to act before the Superior Court of Quebec, as is the case for any other decision of the Régie that is the subject of such judicial review.

The case may continue to be processed by the Régie, unless a decision to the contrary is made by the panel or a decision of the Superior Court of Quebec that suspends its processing until a decision is rendered on a judicial review appeal.

Thank you for your attention.

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