

Recusal Guidelines for Judges of the Environment Court pursuant to s 288B Resource Management Act 1991

Section 288B provides as follows:

288B Recusal guidelines

The Principal Environment Judge must, in consultation with the Chief Justice, develop and publish guidelines to assist Judges to decide if they should recuse themselves from a proceeding.

The Principal Environment Judge, with the concurrence of the Judges of the Environment Court, and after consultation with the Chief Justice, publishes these guidelines for determining issues about potential conflicts of interest and recusals. The procedures described are intended as guidance. Decisions about recusal are very much fact-dependent and the approach taken in particular cases may vary accordingly. Ultimately any decision about a Judge's recusal is for that Judge to make. It is also considered that the Judges are bound to act in this regard and generally, pursuant to the Guidelines for Judicial Conduct.¹

1. There will be some situations in which individual Judges should ask Registrars to ensure that they are not allocated particular cases or classes of case. Non-exhaustive examples may include where a recent appointee to the Bench should not sit on proceedings involving a former client of that Judge in legal practice and, in particular, litigation concerning an issue in which the Judge may, as a practitioner, have been personally involved. Such directions to the Registries will need to be reviewed periodically to reflect the length of time that has elapsed since such a formal association with a party to, or a significant witness in, litigation. Another example of this proactive avoidance of conflicts of interest might include a Judge advising Registrars not to allocate cases in which a party's lawyer or expert witness is from a firm in which a close relative of the Judge is a partner or otherwise works. There will be numerous similar scenarios to which Judges should be alert.
2. If a Judge has any doubt about such self-initiated recusals, he/she should confer with the Principal Environment Judge about this.
3. Apart from such recusals initiated by Judges themselves, Judges will sometimes be required to address questions of potential recusal in particular cases. Such questions may for instance arise when a file is allocated to a particular Judge for case management and/or ultimate hearing and decision. Judges have a

¹ See www.courtsofnz.govt.nz/about-the-judiciary/complaints.

responsibility to familiarise themselves with relevant parts of the court file to consider whether any potential recusal issue may arise.

4. In these circumstances a Judge may realise that there is some matter concerning his/her prospective involvement which he/she considers warrants recusal. In these circumstances, the Judge should stand aside and advise the Registry and the Principal Judge accordingly.
5. Should an issue of potential recusal not be clear-cut, the Judge should consult with the Principal Judge. If, after consultation, the Judge considers the parties should be informed, there should be a formal communication by Minute of the Judge delivered to the parties through the Registrar.
6. In other situations a party or parties might seek recusal by a Judge. Any such communication to the Registry will be directed in the first instance to the particular Judge. That Judge will consider the matter and in so doing should consult with the Principal Judge as to whether he/she should preside.
7. If in any case a Judge decides not to stand down from the case, the parties should be informed of this in a Minute issued by the Judge. If a party maintains an objection, the parties will have an opportunity to file brief written submissions and, if appropriate in any particular case, affidavits. Other parties should be given the opportunity to comment by way of succinct submissions and/or affidavit(s). The Judge should consider the question of recusal with reasons, by Minute that includes any and all circumstances known to the Judge which address any concern that he/she may not be impartial in the case. The Judge's Minute will be delivered to the parties. If not resolved to the satisfaction of all parties there may then be an oral hearing, possibly by telephone, conducted by the Judge.
8. It is recognised that parties not generally familiar with the Court's processes might raise a recusal issue as late as the commencement of a hearing. In such case, the Judge will need to deal with the matter there and then. The principles set out in these guidelines should, to the extent possible, be applied in such circumstances.
9. The following are general principles endorsed by the Principal Judge in consultation with the Chief Justice to which an individual Judge considering a question of recusal should give consideration.
10. The guiding principle is that a Judge is disqualified from sitting if, in the circumstances, there is a real possibility that in the eyes of a fair-minded, objective and fully informed observer, the Judge might not be impartial in reaching a decision of the case. This will include instances where a Judge has a material interest in the outcome of a case but there may also be other circumstances in which the appearance of bias in law arises.

11. The Judge should consider a two-step test, first, of the circumstances relevant to the possible need for recusal because of apparent bias and, secondly, whether those circumstances might lead to a reasonable apprehension that the Judge might not be impartial. This approach requires ascertainment, first, of what it is that might possibly lead to a reasonable apprehension that the Judge might decide the case other than judicially and on its merits. Secondly, the test requires consideration of whether there is a logical and sufficient connection between those circumstances and that apprehension.
12. If, following the Judge's careful consideration and discussion with the Principal Judge, the Judge concerned is satisfied that there is a real possibility that he/she cannot act impartially, or is satisfied that a fair-minded, objective and fully informed observer might reach that view, the Judge will determine not to hear and decide the relevant case.
13. These guidelines will be reviewed periodically and may, after the statutorily-required consultation with the Chief Justice, be amended and republished by the Principal Judge.
14. These guidelines are issued by the Principal Environment Judge pursuant to s 288B of the Resource Management Act 1991 following consultation with the Chief Justice.