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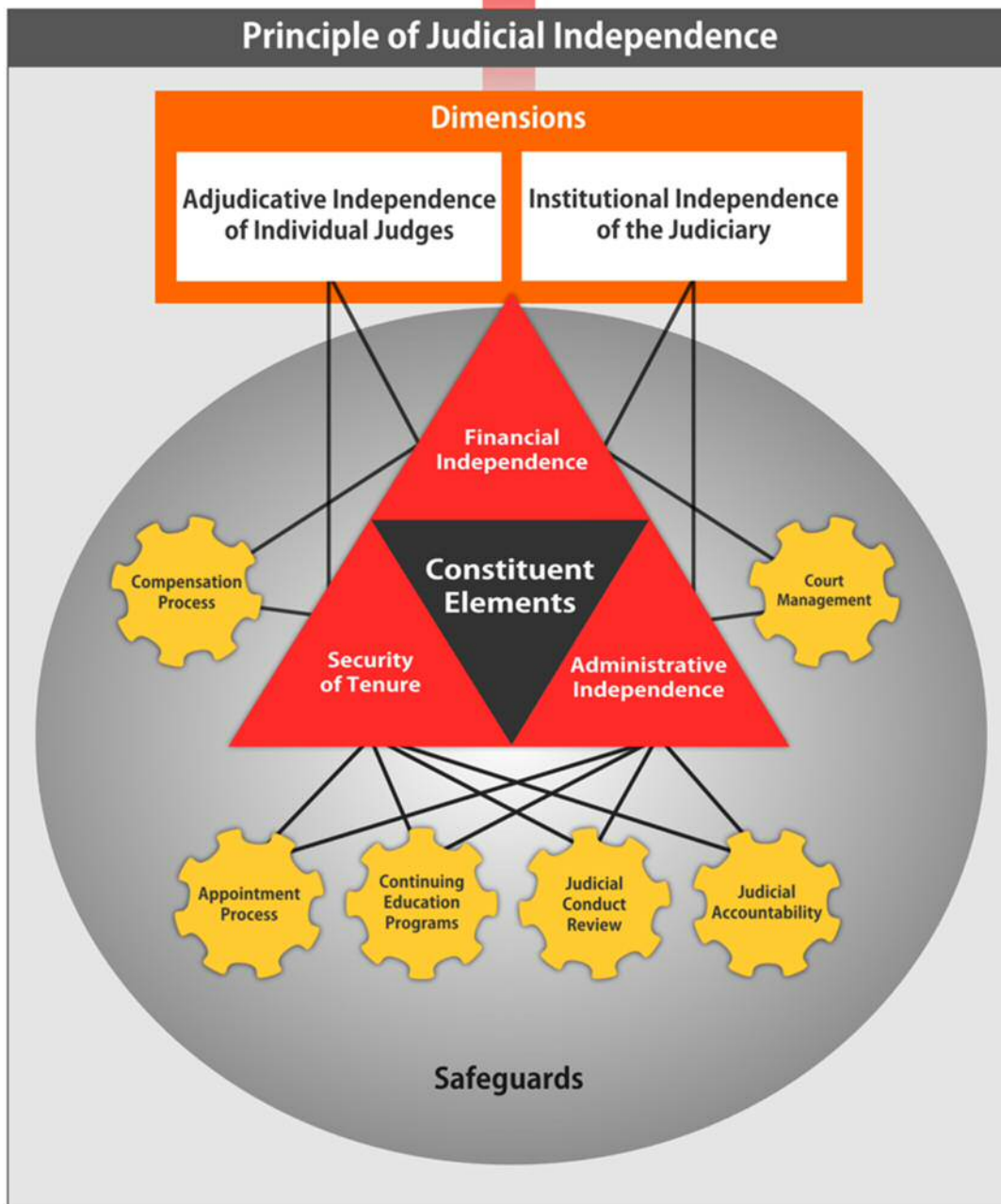
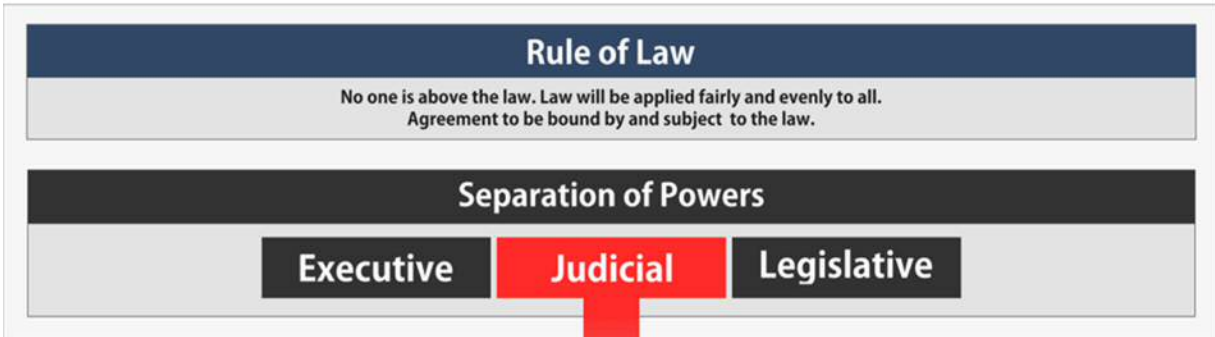
Conseil canadien  
de la magistrature

# WHY IS JUDICIAL INDEPENDENCE IMPORTANT TO YOU?

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# Judicial Independence in Canada



# Why is Judicial Independence Important to You?

## What does “judicial independence” mean?

Judges must be **free**, but obliged, to decide on their own.

Judges must be **set apart from someone else’s influence** or supervision.

Judges **must be insulated against** and independent from any and **all sources of improper influence**. This includes:

- All forms of coercion, threat or harassment, direct or indirect;
- Whether from government, politicians, persons in authority, relatives, neighbours, interested parties, fellow judges, chief justices, judicial bodies or organizations.

Why do we expect our judges to be independent in Canada?

- Judges are individuals **tasked with deciding matters in dispute**. In cases that go to court there is often a “winner” and a “loser” such that in most cases half of the people and sometimes all may not be “pleased” with the outcome.
- The Canadian system of law guarantees a **“fair” trial**, not a “favourable” outcome.

The fundamental concept of judicial independence exists **for the benefit of all citizens**, not judges.

Why does judicial independence protect the judges, the decision makers, from improper influence?

- **To ensure that their decisions will be based upon the law** as it applies to the evidence presented and properly admitted, in order to **do justice between the parties**.

This protection is enforced so that:

- **Citizens will know they were dealt with fairly**, that they received a fair trial, and a fair hearing; and
- Judges are insulated from any improper outside influence and who were bound only by their conscience and the law. Typically, the oath of office of Canadian judges includes “to do right according to law.”

In simple terms **“judicial independence” is a matter of trust**:

- Canadians need to know that legal disputes will be decided fairly, impartially, according to law, and in open court for the entire world to see.

Judicial independence is the **shield that secures and protects those fundamental, constitutionally enshrined values**:

- That is why judicial independence is a **hallmark of Canada’s constitutional democracy**; and
- That is why Canada’s citizens must remain vigilant and loudly protest against any attempt, from any quarter, to impede, frustrate or diminish judicial independence.

Judicial independence is important to you because it guarantees that judges are free to decide honestly and impartially, in accordance with the law and evidence, without concern or fear of interference, control, or improper influence from anyone.

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## Why do we need judges?

The simple fact is that in life people living together in a community have disputes with each other, and with their government:

It may be about a bill that isn't paid;

- Or a neighbour's dog getting loose and injuring your toddler;
- Or your father slips in the shopping centre parking lot;
- Or you are fired from a job;
- Or the government comes after you for back taxes said to be owing;
- Or the engine in the car you just bought blows up a week after you purchased it;
- Or the golf club where you bought a lifetime membership goes bankrupt;
- Or you suffer terrible food poisoning after eating in a local restaurant and are off work for two months;
- Or your daughter is charged with murder;
- Or your spouse is badly injured in a motorcycle crash;
- Or you almost die following surgery because of alleged negligence of the attending doctor and nursing staff;
- Or you didn't get the cottage lot you thought had been promised to you in your grandfather's will because some other relative persuaded him to change his mind;
- Or people divorce and they can't agree on custody and support for the children; and
- Or the legislature adopts a law that violates your constitutional right to vote or to free speech.

These are just examples of the kinds of problems and disputes people run up against every day in Canada.

Laws make us feel safe and secure as we go about our daily lives because we know that most people will obey them. But laws also ensure that citizens do not take matters into their own hands and seek vengeance if they, members of their family, or their friends are victimized.

We no longer joust with lances on horses or challenge each other to a duel. In order to get on with life, people have to have somebody to decide the disagreement between them. Those chosen for this task are judges.

Our courts provide an independent and impartial forum to deal with these important issues. A judge – a person who is legally trained and sworn to uphold the Rule of Law [\[What is the "Rule of Law?"\]](#) – will determine what the law means, whether it has been broken and, if it has, the consequences for those responsible.

## How do judges decide disputes?

The judge has many roles. According to the ancient Greek philosopher Socrates: “Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.”

The judge oversees the proceedings, keeping order in the courtroom and ensuring the case runs smoothly. Sometimes the judge takes on the role of an umpire, resolving disputes that arise over the law and how a case should proceed. The judge decides whether evidence is relevant to the issues before the court and, if it is not, will prevent it from being used. Except for the limited number of trials heard by juries, the judge must assess the facts presented, apply the law to those facts, decide who is responsible, and then determine what relief, punishment or other action is appropriate.

What do we expect judges to do before making up their minds? We expect the judge to be competent and knowledgeable in the laws that govern Canada’s citizens. We expect the judge to listen to both sides and give each side the chance to speak, but enforce the rules so that people don’t all speak at once. And we expect the judge to enforce time limits because the case cannot go on forever.

What else do we expect? Do we expect the judge to be respectful and polite? Do we expect the judge to be fair and, if so, what does “fair” mean? On what basis and what facts do we expect the judge to decide the disagreement: is it only upon the evidence put before the judge by the parties, or can the judge look elsewhere for evidence and assistance? Who ultimately decides? Is it just the judge or can the judge go elsewhere for help in deciding? [\[What are the qualities required to be a judge?\]](#)

By asking these questions, we get closer to a proper understanding of “judicial independence.” In Canada, it means that judges are:

- Free, but obliged to decide on their own;
- Free from fear or favour; and
- Independent from any and all forms of coercion, threat or harassment direct or indirect, whether from government, politicians, persons in authority, relatives, neighbours, interested parties, fellow judges, chief justices, judicial bodies or organizations or any other source of improper influence whatsoever.

By insisting upon such barriers, both in perception and in fact, we seek to protect the judge, as the decision maker, from any improper influence. Why? So that the decision will be based and only based upon the law as it applies to the evidence presented and properly admitted [\[What is the “Rule of Law?”\]](#) so as to do justice between the parties.

## Who does judicial independence protect?

Judicial independence is often misunderstood as something that is for the benefit of the judge. It is not. It is the public's guarantee that a judge will be impartial. Judicial independence protects individuals and the community. The protection of judicial independence is enforced so that the parties will know they were dealt with fairly, that they received a fair trial, and a fair hearing from a judge insulated from any improper outside influence and who was bound only by his or her oath of office, which is to render justice according to law.

To be efficient and meet its objective, judicial independence must also protect judges. Judges have a responsibility to protect their independence and impartiality. They do so not out of self-interest, but as an obligation to the public, which has entrusted them with decision-making power and to whom they are ultimately accountable to maintain the public's confidence in the justice system.

The protection of judicial independence is intended to go much farther than simply any particular case or any particular persons who cannot otherwise resolve their problems. The protection is for the entire community. It is a public trust. The community must have confidence in its system of justice and be comfortable in the knowledge that fairness, openness, and immunity from improper influence are characteristics of its judiciary. In this way, the community will believe that all citizens can expect the same treatment according to the Rule of Law [\[What is the "Rule of Law?"\]](#) and respect for the administration of justice will be maintained and enhanced. These are some of the reasons why judges hear and decide cases in public.

Representation of the goddess Justitia with her eyes blindfolded, holding the scales, does not mean that justice is blind. Rather, the symbolism is to remind us that the Rule of Law is intended to treat all people equally, no matter what their circumstances. Also, judges often wear robes when performing certain adjudicative functions. These gowns are symbolic of the court's authority to act as guardians of the Constitution and protectors of the Rule of Law. The placement of judges on a raised dais within the courtroom is also designed to signify the authority and impartiality of the judiciary and to recognize the importance and the solemnity of the proceedings. [\[What is the "Rule of Law?"\]](#).

In order for all members of the public to be confident that the disputes entrusted to judges will be decided fairly and impartially, the principle of judicial independence must be seen to, and in fact, shield judges from any degree of outside influence from whatever source, especially the legislative and executive branches of government.

The primary and sworn duty of judges is to interpret and apply the law in the adjudication of disputes initiated by litigants or the state. Judges are bound by the law. They do their best to keep their knowledge of the law and of social issues current. All judges must be free to adjudicate in accordance with their oath of office unfettered by coercion or influence from anyone, be it government, the public service, popular public opinion, pressure groups, or other judges except, of course, to the extent that the opinions of other judges may have been recorded and found to be useful as precedent.

Canadians ought to know that justice is not fickle: it does not depend on the judge's whim or preference; it does not bend to the mob or political winds or the agenda of special interest groups; it is not dispensed as a flavour of the month. Rather, its only loyalty is to the Rule of Law [\[What is the "Rule of Law?"\]](#).

Judicial independence requires that a judge adjudicate without fear or favour, even in the face of a contrary view widely held by others, whether judicial colleagues, government, the public, the media, or interest groups. It is the community's responsibility to vigorously resist any steps or initiatives deemed to be an encroachment on judicial independence that would harm rather than protect the public interest.

## What is an infringement to judicial independence in the Canadian context?

Here are some more examples that would appear to undermine or threaten the security and independence of the judiciary:

- An Attorney General wants to take steps to transfer a local judge to an isolated region because the judge's decisions are not in keeping with government policy;
- Appearing on an open line radio show, a Premier threatens to fire any judges who protest their dissatisfaction with their salaries;
- A judge has his life threatened and he and his family are given police protection after he is vilified in the press for having struck down a statutory provision purporting to prohibit possession of child pornography as being unconstitutional;
- A cabinet minister criticizes a judge's decision for not sufficiently following the policy orientation of her government;
- A government undertakes a reform of the administration of the court system without consulting the Chief Justices of the province; and
- The minister of justice or the premier threatens to refuse to provide courts with resources because their government does not like certain decisions rendered by judges.

Do these incidents disturb you? Do they shock your conscience? Would it surprise you to know that they all happened in Canada? Each is an actual case that arose in various parts of Canada in the last 25 years.

The public should know what goes on in Canada and they bear a responsibility as citizens to always ensure a true and respected separation between their three branches of government [\[What is the "separation of powers"?\)](#). The judiciary has no power base except one of public confidence in its integrity and competence in performing the work and duties assigned to it. Thus it falls to the public, the members of the community, to be vigilant and speak out in defense of its judiciary whenever those occasions arise.

Judicial independence is a fundamental institution that must be protected in Canada, as well as elsewhere in the world, to prevent such incidents and others of the same nature occurring in the future.



## What is the “Rule of Law?”

Canadian democracy is founded upon the “Rule of Law.” The expression “law” means a set of rules that governs relationships of citizens with each other; regulates commerce and our lives within the community, and protects people from the unlawful acts of individuals or the state.

In Canada, two different legal regimes co-exist. They originate from the English common law and the French civil law traditions. All over Canada, law can be the product of legislation passed by parliament or provincial legislatures, which is referred to as “statutory law”. In public law and in Canada’s common law jurisdictions, law is also the product of decisions rendered by judges in the sense that the interpretation and application of legislation and legal concepts evolve over time as cases are decided, appealed, affirmed, overturned, modified, distinguished and refined. This source is referred to as “common law”. In Québec, where a civil law system operates in private law, the Code civil du Québec will be applied to many matters before the courts, as it is considered the “droit commun” of the province.

The expression “Rule of Law” describes more generally a single, overarching rule that expresses an agreement – both as individuals and as a collective, a community – to be bound by and subject to the law.

That commitment carries an explicit understanding that such adherence applies to everyone, no matter what their lineage, heritage or station in life. It means no one is above the law:

- It means that kings and queens, prime ministers, army generals, presidents, business titans, and judges themselves, will all face the same laws as the poorest and least advantaged person in society; and
- It means that the law will be applied fairly and evenly to all persons, taking no account of hierarchies, privilege, power or wealth.

Representations of Justitia show the goddess as blindfolded, a metaphor conveying that in order for justice to be fair, it should be dispassionate and blind to matters of authority, power or prestige.

The belief in and an adherence to the Rule of Law is a cornerstone of Canada’s constitutional democracy. It is the tool by which a truly impartial and independent judiciary carries out its work. It is the fundamental idea that each judge has sworn, upon oath, to uphold. The Rule of Law distinguishes us from other countries where no such protections exist: where tyrants and their armies and their secret police hold citizens in terror; where wrongdoers are unaccountable; where complicity goes unpunished; where democracy is illusory; and where the rights of the few can be trampled by the power of the mob, or majority.

## What is the “separation of powers” (legislative, executive, judicial)?

Canada’s parliamentary system is based upon the British tradition. Canada has adopted a model of governance relying on the separation of powers. Under this model, the state is divided in three branches, each with separate powers and areas of responsibility. The separation of powers seeks to ensure that the powers of each branch operate in harmony with the other branches.

The Canadian system of government is divided into three branches: the legislative; the executive; and the judiciary. Each has separate and independent areas of power and responsibility. In its simplest form, the [legislative branch](#) creates the law, the [executive branch](#) administers and enforces the law, and [the judicial branch](#) interprets and applies the law in individual cases [[Canada’s court system](#)]. The [Canadian Constitution](#) requires that each branch adhere to its proper function. [[The Institutions of our federal government](#)] Through a long history, a balance has been struck among these three branches of government, keeping each branch from gaining too much power or having too much influence over the other branches.

The judicial power refers to the types, levels and hierarchy of courts whose responsibility it is to interpret and apply the law, including the Constitution, statutes and regulations, jurisprudence and leading precedents. The judiciary also provides processes to resolve disputes. It administers the law impartially between individuals, and between persons and public authorities. Within the proper limits of their judicial function, judges also guarantee the observance, protection, and attainment of human rights. Judges ensure that all people are securely governed by the Rule of Law [[What is the “Rule of Law?”](#)] and equal justice under law.

Judicial independence means that the judiciary must be kept distinct and apart from the other branches of government. For example, in Canada, judges do not participate in election campaigns or hold public office in government. The courts and judges must be shielded from improper influence stemming from the legislative or executive branches of government. Courts must also be sheltered from private or partisan interests. Judicial independence is vital to the model of governance of the state based on the separation of powers.

Despite being separate branches, there are some situations in which it makes sense for the chief justices to collaborate with the executive branch of government. Examples might include:

- Providing technical support for case management;
- Joining forces in the roll-out of new judicial initiatives such as e-filing;
- Designing protocols for the security of members of the public, staff and judges within courthouse facilities;
- Planning the design and the construction of new or renovated courthouses; or
- Evaluating the impact of budgetary cuts upon judicial resources and capacities.

Thus, there is an ongoing dialogue between the judiciary and the executive power to make the system of justice function properly. However, this essential collaboration is exercised within the constraints established by the separation of powers between the legislative, the executive, and the judicial branches, which is a fundamental characteristic of the Canadian political system.

**What are the dimensions of judicial independence (adjudicative independence of individual judges and institutional independence of the judiciary)?**

The principle of judicial independence takes on **two main dimensions**, namely:

- The adjudicative independence of judges **on an individual level**; and
- The independence of the **judicial institution** through the administration of justice that is separate from the executive and legislative branches.

Although these two dimensions are essential to true judicial independence, they are not always easy to differentiate. For discussion purposes the constituent elements belonging to each of the two dimensions of judicial independence are split as follows:

<b>Dimensions of Judicial Independence</b>	
<b>Adjudicative Independence of Individual Judges</b>	<b>Institutional Independence of the Judiciary</b>
<ul style="list-style-type: none"> <li>• Impartial decision-making</li> <li>• Security of tenure</li> <li>• Financial security: pay, benefits and retirement plan</li> <li>• Continuing education</li> <li>• Ethics and conduct standards</li> <li>• Accountability</li> </ul>	<ul style="list-style-type: none"> <li>• Administration of justice by judges</li> <li>• Management of the court</li> <li>• Assignment of judges to cases, determination of sittings and lists of the court and related areas such as the allocation of courtrooms and management of the administrative staff</li> <li>• Conduct review, removal</li> <li>• Administrative and institutional relationships with the legislative and executive government bodies</li> </ul>

Because judicial independence involves judges occupying a privileged position in their community and in society and making unpopular decisions, judicial independence is susceptible to attack by uninformed or irresponsible critiques made out of context. It always needs to be appreciated that judicial independence exists for the benefit of the public, and that each dimension of judicial independence is a necessary element that exists to uphold that overall objective. The attack upon anyone of the components of the principle of judicial independence may very well compromise the institution or its members.

For example:

- An elected official’s attempt to intervene with a judge regarding one of his or her decisions is a violation of the judge’s individual independence and of the separation of powers; and
- Unilateral reforms to the judicial system attempted by governments directly interfere with the principle of institutional judicial independence. The necessary improvements to the administration of justice must be initiated, planned, determined and implemented in close collaboration with the chief justices, who are responsible for the administration of Canadian courts.

The possibilities and types of intervention needed to defend the principle of judicial independence must take into account the dimension in question.

**Independence ensures that judges are free to:**

- Assess the evidence;
- Apply the law;
- Decide the outcome of cases without regard for who will be pleased or displeased with the result;
- Uphold the Rule of Law;
- Fulfil that duty free from outside influences; and
- Decide cases fairly and impartially, and citizens can be confident in the integrity of the results.

## What are the attributes of judicial independence (security of tenure, financial security, institutional and adjudicative independence)?

To preserve judicial independence, the Constitution of Canada and decisions of the Supreme Court of Canada requires the following elements [\[Sections 99 and 100 of the Constitution of Canada\]](#):

1. [\[Security of tenure\]](#): Once appointed, a judge is entitled to serve on the Bench until the age of retirement, unless, for Superior Court judges, both houses of Parliament agree that the judge should be removed from office. At the provincial and territorial level, the cabinet or legislature has the similar power to remove a judge for misconduct.
2. [\[Financial security\]](#): Judges must be paid sufficiently and in a manner that insulates them against pressure from other institutions or individuals.
3. [\[Administrative and adjudicative independence\]](#): Institutionally, courts must be able to decide how to manage the litigation process and the cases judges will hear. On an individual level, each judge has the right, freedom and duty to decide the case alone, truly independent from any outside influence whatsoever. Judges must be provided with sufficient resources to carry out their constitutional responsibilities.

## Security of tenure

Once a judge has been appointed, governments have no control over how long the judge will serve on the Bench. Under the Constitution, superior court judges can remain in office until reaching 75, the mandatory retirement age [\[Section 99 Constitution Act, 1867\]](#). For provincial-level courts, the age for mandatory retirement varies. Federally appointed judges who have reached a threshold age and have a certain number of years of experience on the bench may choose to become supernumeraries. A replacement judge will be appointed but the supernumerary judge will continue to discharge judicial responsibility on a part time basis, providing the courts with experienced judges to deal with long trials or to help clear up any backlog of cases.

Under the federal law, superior court judges can be removed from office for misconduct, due to advanced age or infirmity, or if they fail to properly exercise the powers of judicial office. Only Parliament has the power to remove a superior court judge from office on such grounds. A joint motion of the House of Commons and the Senate is required, but this procedure has never been used (s. 65(2) *Judges Act*, R.S. 1985, c. J-1).

At the provincial and territorial level, the cabinet or legislature has the power to remove a judge for misconduct.

## Financial security

To properly and fairly moderate the government's direct involvement in the financial security of judges, independent commissions are established at regular intervals to review the salaries and the benefits of judges. For example, a commission is struck every four years to undertake the review and recommend any increase to Parliament. Remuneration must be sufficient to attract the best candidates and to ensure that judges are sufficiently compensated to be able to perform the important duties inherent to their office (<http://www.quadcom.gc.ca/>).

With certain modifications, similar systems operate in every province and territory to maintain an appropriately independent review of salaries paid to provincial and family court judges.

These institutional safeguards preserve the public interest in an independent Canadian judiciary. Protection of salaries and benefits, security of tenure, and lifetime annuities upon retirement all serve to protect judicial independence.

## Administrative and adjudicative independence

Judicial independence means both the independence of an individual judge from outside influences or pressure, as well as an institutional independence for the entire Canadian judiciary, as a body, from any influence from external pressures, direct or indirect, and more especially from the other two branches of our government. [\[What is the "separation of powers?"\]](#).

Courts must be able to operate in a manner that shields judges from outside influences. While judges are appointed by government, they are not government employees. While governments cover the cost of running the justice system – providing courthouses and facilities and paying support staff – they must not have control over how judges perform their role or who hears a particular case. The courts establish policies, set dates for hearings and assign judges. Although the Chiefs Justices of the courts oversee these administrative matters, they do not tell a judge what ruling to make because judges have complete independence from each other.

The judiciary as a whole must remain separate from other branches of government to prevent any suggestion of improper influence. The Supreme Court of Canada has stated the aspects of administrative independence necessary to maintain a constitutionally-sound separation between the judiciary and the other branches of government [\[How has the Supreme Court of Canada defined judicial independence?\]](#). They include:

1. The assignment of judges to hear particular cases;
2. The scheduling of court sittings;
3. The control of court lists for cases to be heard;
4. The allocation of courtrooms; and
5. The direction of registry and court staff in carrying out these functions.

These functions must remain within judicial control. The public could not have confidence in the independence and impartiality of the courts if others, outside the judicial branch, could control or manipulate proceedings by interfering in any of these functions. A judge cannot be independent if the necessary support staff is unavailable, or is subject to the control of and accountable to others.

To be truly independent, judges, as individuals, must be free to make decisions free from any improper source of influence. They must be insulated against and independent from any and all sources of improper influence. This included all forms of coercion, threat or harassment—direct or indirect—whether from government, politicians, lobbyists, interest groups, enterprises, persons in authority, relatives, neighbours, interested parties, fellow judges, Chief Justices, judicial bodies or organizations, or any other source of inappropriate influence whatsoever.

Canadian judges are immune from civil and criminal process when performing their judicial functions. Judges cannot be sued for anything they do while carrying out their judicial duties. This immunity is crucial if judges are to fulfil their sworn duty to assess the evidence and apply the law. If judges could be sued for defaming someone's character, for instance, it might prevent them from freely expressing themselves in deciding matters of credibility and whether a witness is telling the truth.

Adjudicative independence guarantees that judges are free and obliged to make decisions on their own, based only on the evidence they have heard, and the law. In this way, their judgments are seen to be free from fear or favour, never arbitrary, and never motivated by favoritism, spite or suspicion [\[How do judges decide disputes?\]](#). The only "fear" judges have in making decisions is not a fear at all but rather an assurance that their errors will be rectified on appeal [\[How are judges accountable?\]](#).

Judicial independence is therefore a public interest and an essential element in maintaining respect for, and adherence to, the Rule of Law [\[What is the "Rule of Law?"\]](#).

**What are some of the safeguards of judicial independence (court management, judicial compensation process, judicial appointments process, judicial continuing education, judicial conduct review, judicial accountability)?**

How is judicial independence concretely protected in the Canadian context? What measures have been put in place to guarantee the respect and the protection of this fundamental principle to our Canadian judicial system?

***What is a Safeguard of Judicial Independence?***

Safeguards are means by which the principle of judicial independence is protected to maintain constitutional order and public confidence in the administration of justice. They are concrete measures that implement the constituent elements of judicial independence and therefore, protect the principle as a whole.

These safeguards are but examples of the main means relied upon to protect the independence of the judiciary in Canada.

**Court Management**

Since the administration of justice falls within provincial authority, the province is responsible to fund court services.

In order to protect the institutional independence of the judiciary, a safeguard must be put in place to avoid governmental interference being exercised through financial decisions and restrictions.

Consequently, judicial input is critical to ensuring appropriate resourcing of court services. Judges responsible for the administration of Canadian courts must be involved to:

- Initiate;
- Plan;
- Determine; and
- Implement the necessary improvements to the court system.

In difficult economic times, attempts at reform and budget expectations become particularly pressing. In this context, the necessary boundary between the judicial and the executive branches must be enforced to guarantee the administration of the courts free from undue interference.

To preserve judicial independence, the executive must not interfere with the adjudicative function of the judiciary.

Canadian courts play a fundamental role as resolvers of disputes, interpreters of the law and as defenders of the Constitution.

These roles require that the judiciary be completely separate in authority and function from the legislative and the executive powers since their representatives are the most frequent participants or parties before the courts.

The court management safeguard protects judicial control over administrative decisions that bear directly on the exercise of the judicial function. For example, matters for the judiciary and which the executive must not attempt to influence include:

- Assignment of judges to hear particular cases;
- Scheduling of court sittings;
- Control of court lists for cases to be heard;
- Allocation of courtrooms; and



- Direction of registry and court staff in carrying out these functions.

Finally, the funding of the courts must be maintained at least at the minimum service level required to protect judicial independence and give effect to the Rule of Law.

### **Judicial Compensation Process**

Government's influence over the financial security of judges is moderated by the constitution of authorized independent commissions established at regular intervals to guarantee the adequacy of judicial remuneration.

For example, every four years the federal government, in consultation with the judiciary, sets up an independent commission of three members who must inquire into the adequacy of salaries, benefits and other amounts payable to judges. Similar independent processes determine financial security for provincially appointed judges.

Thus, determination of salaries, benefits and lifetime annuities upon retirement serve to protect judges from improper influence and to guarantee the principle of judicial independence.

### **Judicial Appointments Process**

The system of judicial appointments must instill public confidence in the judiciary:

- The first goal of this safeguard is to appoint competent, independent persons of unimpeachable integrity as judges; and
- The second objective is to ensure the impartiality of judges after their appointment to the bench.

To this end:

- Security of tenure;
- Adequacy of remuneration; and
- The institutional independence of the court must be protected.

Judges are appointed either federally or provincially, depending on the level of court. The process – no matter what the court – is similar across the country.

Independent judicial advisory committees are at the heart of the appointment process. If a lawyer wishes to be considered for judicial appointment, he or she must submit a detailed personal history. Extensive background checks and reference checks are conducted. The advisory committee, which is comprised of representatives from various organizations and who come from all walks of life, then carefully scrutinize and assess the qualifications of those who have put their names forward.

The advisory committee then decides which candidates should be recommended. Only those recommended are eligible for appointment.

The list of approved candidates is sent to the appropriate Minister of Justice (provincial or federal) who makes recommendations to Cabinet. Final appointments are made by the Governor General or Lieutenant Governor acting on the advice of Cabinet.

## Judicial Continuing Education

Many independent organizations have been created at the federal and provincial levels dedicated to the continuing education programs for judges. Since interference in judicial education may violate the principle of judicial independence, these programs are reserved for judges.

Based on a made-in-Canada educational model, which is now generally heralded as the “gold standard” around the world, judges, through their chief justice:

- Determine their own needs as well as the content of the various education and training programs. The initiative belongs to judges;
- The specific determination of each training program is done by a team of judges, who are experts in the field and are recognized by their peers;
- The judges’ committee is supported by a number of people such as administrators and experienced professors, who are bound by confidentiality;
- However, the control over the content of training programs remains with the judges;
- The training is led by judges and the majority of instruction is also done by them;
- The judicial instruction organizations receive independent funding from several sources in order to prevent external interference; and
- In general, judges choose the training they want to take based on the constraints of their judicial duties.

## Judicial Conduct Review

The operation of Canadian justice relies on the existence of:

- A highly trained;
- Professional; and
- Independent judiciary.

Parliament created the Canadian Judicial Council, giving it power to investigate and rule on complaints about the conduct of federally appointed judges. Provincial judicial councils perform a similar function in relation to provincially appointed judges.

The Canadian Judicial Council and similar provincial judicial organizations publish documents that discuss the ethical standards to which judges aspire. For example, the Canadian Judicial Council had adopted “[Ethical Principles for Judges](#)” with the goal of assisting judges with the difficult ethical and professional issues which confront them. Another purpose of these ethical principles is to assist members of the public to better understand the judicial role. However, because of the principle of judicial independence, “they are not and shall not be used as a code or a list of prohibited behaviors. They do not set out standards defining judicial misconduct”.

## Judicial Accountability

Judicial accountability ensures that justice is rendered according to the law.

Judicial accountability measures are essential to protect the proper application of the Rule of Law, a cornerstone of Canada’s constitutional democracy.

Judicial independence does not give judges the right to do whatever they wish. Many measures exist to ensure that judges are held accountable, including:

- The absolute requirement that cases be decided in open court according to the law and the evidence;
- The duty to provide sufficient reasons for their decisions, which will be available in the public domain;
- The obligation to decide cases according to the evidence and the law;
- Accountability to the public interest for independent decision-making based upon established and discernable principles of law; and
- The possibility of appeal of their decisions to a higher court.

Judges are independent but remain accountable for their actions:

- Court proceedings are open to the public;
- Journalists and citizens can judge for themselves whether justice has been done. They are free to debate and criticize a judge's decision; and
- Private hearings are rare and only held to protect a person's privacy or other important societal interests, such as children's welfare.

The conduct of judges, inside and outside of their courtrooms, can also be investigated by federal or provincial judicial councils that have been given formal investigating powers to account for their behavior and impose measures or recommend sanctions to be taken by the proper authorities.

For all of these reasons judges are, and are seen to be, accountable for their adjudicative functions:

- They have sworn an oath to render justice according to law;
- Their impartiality and independence is constitutionally enshrined;
- Their independence, impartiality and integrity are presumed as a matter of law.
- They hear cases, and render judgment in public;
- Their decisions are subject to appeal;
- Their reasons are published and may be openly criticized in the press, academic journals or other public discourse; and
- Their conduct as judges, as distinct from their judgments, if found wanting, may be the subject of investigation and sanction by federal and provincial judicial councils.

Accountability provides a "check and balance" to satisfy the community that the trust reposed in its judiciary is deserved and that respect for the administration of justice is well-founded. It ensures that the authority of judges, whether as individuals or as an institution, is not abused.

Such public accountability anchors public confidence in the independence and impartiality of Canada's judiciary. Thus accountability acts as a safeguard to preserve judicial independence and provide judicial impartiality.

## Why is judicial impartiality important to you?

Citizens must have confidence that justice will be administered in a fair and impartial manner and the courts will respect the Rule of Law [\[What is the “Rule of Law?”\]](#) when making decisions. If judges do not act fairly, or leave an impression that their minds are made up before the case is heard, members of the public will lose faith in the ability of the justice system to resolve disputes. This can lead to citizens taking the law into their own hands, which at its worst can lead to fear and open violence.

Judges make every effort to avoid conduct and situations that could undermine public confidence in their impartiality. They must not, by their words or actions, appear to have prejudged a case or to favour one of the parties involved in the cases that come before them.

The Rule of Law is meaningless if citizens do not have confidence that judges approach a case with an open mind and free of ties to those involved in a case. Antonio Lamer, a former Chief Justice of the Supreme Court of Canada, has said, “The Rule of Law, interpreted and applied by impartial judges, is the guarantee of everyone’s rights and freedoms. Judicial independence is, at its root, concerned with impartiality, in appearance and in fact.” To this end, judges must conduct themselves—both on the Bench and when outside the courtroom—in a way that enhances the appearance of impartiality. The legal test that courts apply is whether a reasonable person could conclude the judge would be unable to be fair, objective and impartial when hearing a particular case [\[Committee for Justice and Liberty c. Canada \(National Energy Board\), \[1978\] 1 S.C.R. 369\]](#).

To be and appear to be impartial, judges should:

- Apply the law, notwithstanding one’s personal beliefs; Strive to overcome personal biases; [\[Impartial judicial decision making process\]](#)
- Avoid placing themselves in a conflict of interest situation, one where their impartiality might be questioned. Consequently, they would decline to preside over cases involving relatives or close friends, or companies and organizations to which they have close ties; [\[recuse themselves in some cases\]](#)
- Be true to their duty of restraint that must be manifest during their work at the Court as well as in their life in society. The judges’ duty of restraint is an obligation to be manifestly impartial and to avoid any conflict of interest required by their judicial functions inside and outside the courtroom. The judges’ duty of restraint prevents them from entering public debate. The duty of restraint combined with the citizens’ fundamental right to an impartial trial imposes some limits on judges’ freedom of speech [\[What is a judge’s “duty of restraint”?\]](#);
- Be shielded from tumult and controversy that may taint the perception of impartiality;
- [\[adopt an irreproachable conduct outside courtroom\]](#);
- [\[adopt an irreproachable conduct inside courtroom\]](#); and
- [\[be involved in their community in conformity with their judicial function\]](#).

Judicial independence enables judges to make rulings that may be unpopular. Judging is not a popularity contest and the courts must be able to uphold the legitimate rights of individuals and minority groups regardless of the views of the majority of citizens. Judges may make rulings that outrage victims of crime, the police, politicians or lobby groups, or force governments to change policies or amend the law. It is the role of the courts to do justice and uphold the Rule of Law, not to please everyone. Each case will have a winner and a loser and, no matter what the outcome, judicial independence assures that both sides will receive a fair and impartial hearing.

The symbol of justice as a blindfolded figure, balancing a set of scales, serves as a reminder that justice is achieved by weighing evidence free from internal bias and outside influences. In our system of justice, judges—and in some cases juries of average citizens—balance the scales and ensure that cases are decided fairly and impartially.

## Impartial judicial decision making process

It is not unreasonable to assume that judges will have personal views about matters of current, public importance such as abortion, bullying, child abuse, corporal punishment, domestic violence, health care, homelessness, pedophilia, pornography, same sex marriages, taxation, and terrorism. It would be odd if responsible, well-educated, and informed citizens were not possessed of sentiments or positions concerning such subjects.

But that does not mean that judges holding such personal beliefs or having such views cannot sit as judges in cases where these same issues will arise. If that were the rule, there would be no one left to judge the conduct of others.

Canadians have the right to expect, based on what a reasonable observer present throughout the trial would expect, that the judge presiding will decide the case with an open and dispassionate mind. It is demanded, however, that the judge be able to set aside whatever personal beliefs may be held and decide the case according to the evidence presented and the law. Often, that is exceedingly difficult. But judges have done this for centuries and this occurs every day in our country. It is what we mean by “impartiality,” which is an essential quality of a judge’s work. Anything less would be a violation of the oath taken when the judge was sworn into office.

What mental practices lead judges to impartiality in this sense? One, as old as judging itself, is the injunction that the judge should proceed on the basis of the facts, the submissions, and the law in the record before the court. Judges on the Bench are no longer members of any interest group. They are not sworn to promote any cause. They are sworn only to do justice between the parties in accordance with the law.

A second injunction, almost equally well-recognized, is that judges should hold the decision in abeyance until they have thoroughly considered all sides of the issue. This is one of the hardest tasks facing judges. Judges must resist the temptation to let their minds, trained to pierce to the heart of the matter, wrap it up in the first minutes or hours of a difficult case. The human tendency is to solve the problem and get to the answer. But that is not the task of judges. Eventually they will get to the answer, but their first responsibility is to listen and hold their judgment in reserve until they have fully canvassed all the points of view presented. The first task of the judge is not to judge, but to understand. In a word, judges should not be too quick. They should never be results-oriented.

However, patience alone will not bring judges to understanding. An understanding of what is really happening and truly significant in the case requires an active effort to appreciate how each party sees the matter. To do so, judges must appreciate the social and psychological context of the case. A useful technique to ensure full appreciation of both sides of the debate is to consciously put oneself in the shoes of first one party, then the other. The judge should ask “How would I feel if I were in this person’s position?” In an act of imagination, the judge should attempt to see life through each litigant’s eyes, much as an actor attempts to see a situation through the eyes of the character being portrayed. If the character is unsympathetic, the effort may be difficult, even distasteful. Yet it is important. For it is in this way that the judge sees the larger picture and moves from partiality to impartiality. For example, in [R. v. Lavallée \[1990\] 1 S.C.R. 852](#), the partial picture of a woman who shoots her common-law husband in the back is replaced by the fuller picture of a woman who is certain that if she does not shoot now, he will kill her later. Or take the example of [Brooks v. Canada Safeway Ltd. \[1989\] 1 S.C.R. 1219](#), the partial picture of a woman who chooses to become pregnant and hence to leave her job, is replaced by a larger picture of a woman who, if deprived of employment benefits, will unfairly be made to bear the entire social cost of pregnancy.

Deciding on the basis of the record, suspending judgment, and putting oneself in each litigant’s shoes by an act of imagination, are three techniques which can be used to ensure judicial impartiality. A final and indispensable judicial practice in the search for impartial justice is a conscious commitment to rationality.

Gender and racial stereotypes are simply a shorthand way of solving problems. The essence of stereotypes is the pigeon-holing of people and drawing a facile inference from the category into which they have been placed to the desired conclusion,

such as the ability to do a job, the approach of a person to an intimate relationship, the likelihood that the person committed the offence in question, or the appropriate sentence. Stereotypical thinking, characterized by phrases like, “Just like a woman, what do you expect?”, or “He’s a man, what else could he do?” saves the holder of this view the trouble of examining the real facts relevant to the decision that must be made. The decision is made not on the basis of relevant circumstances, but on the basis of the category into which we have slotted the person or persons in question.

Stereotypical thinking is not easy to eradicate. Yet judges can train themselves to avoid it. The first step lies in sensitizing themselves to the stereotypical assumptions that form part of our mental baggage. After identifying these false certainties, the judge must go on to eliminate them from the reasoning process, replacing them with an appraisal of the true reality of the case and the relationship it involves. Followed honestly—that is, in a spirit of examination rather than confirmation—this rational process can be a powerful aid to ensuring that judicial decisions are not based on stereotypical assumptions, but rather on a true and impartial examination of the facts proved in the case and the proper application of the law. The end result of these practices—the putting aside of personal views, the preserving of an open and patient mind, the mental act of placing oneself in the position of each of the parties, and finally, the use of reason to draw inferences from carefully considered facts instead of stereotypical assumptions—might be called the “art” of judging.

### **Recuse themselves in some cases**

#### **Grounds for disqualification from hearing a case**

Judges seek to avoid placing themselves in a conflict of interest situation, one where their impartiality might be questioned. Consequently, they would decline to preside over cases involving relatives or close friends, or companies and organizations to which they have close ties.

### **Adopt an irreproachable conduct outside courtroom**

#### **Conduct outside courtroom**

Judges must make every effort to avoid conduct that could undermine public confidence in their impartiality. The judge is “the pillar of our entire justice system,” the Supreme Court of Canada has said, and the public has a right to demand “virtually irreproachable conduct from anyone performing a judicial function.” Judges must show respect for the law in their private life. As well, a judge must behave in public in a manner that fosters respect for the judiciary. Judges are not expected to be hermits and are entitled to enjoy life with their friends and families. However, they must be wary of socializing or associating with anyone connected with the cases that come before them.

This is not a matter of questioning a judge’s integrity, but of avoiding the appearance of favouritism. Judges must not, by their words or actions, appear to have prejudged a case or to favour one of the parties involved in a case. For this reason, judges exercise caution in granting interviews to the media and in accepting invitations to speak in public. Judges are not barred from speaking in public and, indeed, it is recognized that judges can make an important contribution to public debate about the role of the courts and the importance of judicial independence. [\[What is the duty of restraint?\]](#)

But judges must be wary of commenting on political, legal, or social issues that could become the subject of a court case. If, for instance, a judge makes a public statement advocating a particular approach to the rights of a minority or youth crime, the judge might be expected to withdraw from future cases involving such issues. Such restraint is not so much to avoid embarrassment or public controversy; rather, it is seen as a way to guarantee a fair trial, both in fact and in appearance. [\[What is the duty of restraint?\]](#)

“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,” the Supreme Court of Canada noted in its 1997 ruling in the case of [R. v. S. \(R.D.\) \[1997\] 3 S.C.R. 484](#): “If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.”

## Adopt an irreproachable conduct inside courtroom

### Conduct inside courtroom

Judges must maintain control over proceedings, ensuring trials and hearings are conducted smoothly and efficiently, while affording each party an opportunity to present their case as they see fit. Court proceedings require a certain level of solemnity and decorum. Accordingly, judges will ensure that an appropriate standard of formality is maintained.

Judges must strive to treat each party and witness with courtesy and civility. It is the judge’s responsibility to make tough decisions, and this may lead the judge to criticize the conduct of a party or lawyer or to question the credibility or motives of a witness. It is proper for the judge to make such findings if they are reasoned and supported by the law and the evidence. In the words of the Canadian Judicial Council’s Ethical Principles for Judges: “Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary [...] Judges must be and should appear to be impartial with respect to their decisions and decision making.” [\[Ethical principles for Judges\]](#)

## Be involved in their community in conformity with their judicial function

### Community involvement and other activities

Outside the courtroom, judges must approach community or charitable work with caution. In general, a judge may be able to serve as an officer, director, trustee or advisor to an educational, religious, charitable or civic organization, as long as the judge is not involved in legal issues, does not provide legal or investment advice, and does not participate in soliciting donations (unless limited to one’s family or otherwise approved by the judge’s ethical advisory body). Since the judge would be disqualified from presiding over any case involving the organization, judges should avoid taking part in organizations that are routinely involved in legal actions. [\[What is the duty of restraint?\]](#)

If a judge has been politically active as a lawyer, such activities must end when the person is appointed to the Bench. Judges cannot belong to a political party and they cannot attend political meetings or fundraising events. As well, they must not raise money for a political party or make donations to a party. [\[What is the duty of restraint?\]](#)

Members of a judge's immediate family may have to curtail their political activities, to ensure such activities do not undermine the appearance that the judge is impartial. Judges must refrain from signing petitions, but they are allowed to vote in elections should they be so inclined.

The [Judges' Act](#) stipulates that no superior court judge "shall, either directly or indirectly, for himself or others, engage in any occupation or business other than his judicial duties, but every judge shall devote himself exclusively to those judicial duties." This does not prevent judges from accepting a government request to conduct a commission of inquiry or other official investigation into a disaster, the misuse of public funds or other controversy. Indeed, the selection of judges to take on such roles is a measure of their independence from government and the public's respect for their impartiality.



## Why are trials public?

In Canada, judges do their work in public. Cases are heard in open court except in the most unusual circumstances: for example, to protect privacy or the identity of a person, such as a minor; or to ensure that evidence is properly presented; or to ensure a fair trial. Judges and the proceedings before them do not take place behind closed doors.

Canadians have a right to know what is going on in the courtrooms of their country. That is why cases are reported in the press and social media, on radio and television, and over the Internet. Openness and transparency are characteristics of the Canadian justice system. Members of the community ought to feel free to sit in any courtroom in the country, watch what is going on, and draw their own conclusions about the case, the people involved, and the fairness of the proceedings [[The relationship between the courts and the media](#)].

Why is it important to have cases heard and determined by judges in public? Why is it important that we have cases heard and determined by judges in this fashion?

Consider the alternative:

- How would you like it if in the middle of the case where your daughter had been charged with murder, the presiding judge decided to call up the chief investigator to “find out for himself what was really going on”?
- Or when an acquaintance is prosecuted for tax evasion, the judge is seen having lunch with the Minister of National Revenue?
- Or in the case involving your neighbour who was badly injured in a motor cycle crash, the chief justice meets with the trial judge to indicate that the other motorist involved is a close personal friend, a mother of three with a serious drinking problem, and she hopes the trial judge will “go easy on her.”
- Or you are about to be sentenced for trafficking in cannabis by a judge who has been frequently criticized in the newspapers for “being too lenient” and where local politicians are reported as saying that the judge “should be fired” or “sent back to school” unless “he smartens up.”

Would such contacts, attempts at communication with the judge hearing the case, or public criticism of the judge bother you? Why, or why not?

Would you feel that your case against the provincial government was being dealt with fairly if you knew the premier or a member of the cabinet were in touch with the judge to discuss your case?

Or that the judge’s daughter was married to a high ranking official who happened to work in the government department on the other side of your dispute?

How would you ever know that such approaches had been made or were being attempted? What level of comfort do you have that it wouldn’t or couldn’t happen?

There is another reason why a judge’s work in presiding over a case is done in public for “all the world to see.” Print journalists, radio, television and social media reporters, interested family members and even entirely disinterested citizens who have nothing to do with the proceedings ought to feel welcome in any court in Canada to see for themselves what goes on there: to come to their own conclusions whether respect for, and confidence in, the administration of justice is well-founded. We live in a country where the decisions, but not the judges who wrote them, can and ought to be subjected to public scrutiny and debate by academics and journalists, in letters to the editor, on the Internet, or any other medium chosen by informed and responsible citizens who have formed an opinion on the subject. That is what freedom of expression is all about. [[Why is judicial impartiality important to you?](#)]

Open and public courts operate to make judges accountable [\[How are judges accountable?\]](#). Court proceedings, with few exceptions, are open to public scrutiny so that citizens can judge for themselves whether justice has been done in keeping with judicial independence.

Finally, court proceedings must be conducted with a certain level of solemnity and decorum. This formality is essential to the authority of the Canadian judicial court system [\[Conduct inside the courtrooms\]](#).

In sum, the integrity, impartiality and independence of Canada's judges is presumed as a matter of law. This presumption is established and maintained by the open courts principle where cases are tried in full public view, are monitored and reported upon by a free and independent press, and where decisions are easily and freely accessible for this country's citizens.

## What are the qualities required to be a judge?

If Canadians were asked what qualities they would expect to see in a judge, they would likely include attributes like competent, non-partisan, wise, open-minded, patient, tolerant, respectful, diligent, prompt, courageous, impartial, independent and possessing unquestionable integrity. Canadians have come to expect—and have the right to expect—such qualities in the members of the judiciary. [\[Ethical principles for judges\]](#).

Judges in Canada are appointed as opposed to elected. The federal government [\[Office of the Commissioner for Federal Judicial Affairs Canada - Process for an Application for Appointment\]](#) and each province have independent selection processes and screening committees.

The system of judicial appointments must instill public confidence in the judiciary:

- The first goal of this safeguard is to appoint competent, independent persons of unimpeachable integrity as judges; and
- The second objective is to ensure the impartiality of judges after their appointment to the bench.

To this end:

- Security of tenure;
- Adequacy of remuneration; and
- The institutional independence of the court must be protected.

Judges are appointed either federally or provincially, depending on the level of court. The process – no matter what the court – is similar across the country.

Independent judicial advisory committees are at the heart of the appointment process. If a lawyer wishes to be considered for judicial appointment, he or she must submit a detailed personal history. Extensive background checks and reference checks are conducted. The advisory committee, which is comprised of representatives from various organizations and who come from all walks of life, then carefully scrutinize and assess the qualifications of those who have put their names forward.

The advisory committee then decides which candidates should be recommended. Only those recommended are eligible for appointment.

The list of approved candidates is sent to the appropriate Minister of Justice (provincial or federal) who makes recommendations to Cabinet. Final appointments are made by the Governor General or Lieutenant Governor acting on the advice of Cabinet.

## What is a judge's "duty of restraint?"

Judges have a duty of restraint which must be manifest during their work at the court as well as in their life in society. This duty is an additional guarantee of judicial independence and impartiality. The respect and confidence put in the judiciary "require that judges be shielded from tumult and controversy that may taint the perception of impartiality ..." ([Ruffo v. Conseil de la magistrature, \[1995\] 4 S.C.R. 267](#)) [[What are the qualities required to be a judge?](#)] [[Ethical principles for judges](#)]

### Inside the courtroom

Judges must resist temptation to express themselves outside the law and must show extreme caution. Comments that do not bring anything to the debate can also harm the image of justice and undermine the citizens' confidence in the judicial system, while raising doubt about the essential objectivity citizens are entitled to expect from judges.

### About their decisions

Judges express their views on the law in their judicial decisions. They provide reasons for their decisions, often in writing, but they do not justify or explain their decisions to the public or to anyone in government. The judges' duty of restraint prevents them from entering public debates about their judicial opinions.

### Outside the courtroom

Judges should, as a rule, reserve their public comments and opinions for the courtroom. While judges can make public appearances and speeches, they must take great care not to express opinions that could be seen as prejudging conduct or issues they may be called upon to consider in future cases.

Judges should avoid speaking out or becoming publicly associated with matters of controversy or subjects which might well come before the courts. Examples would include:

- Protesting a proposed condominium in one's neighbourhood;
- Questions regarding electoral boundary reform;
- Comments on gun control and registration;
- Calls for the impeachment of elected officials;
- Opinions on same sex marriage;
- Permitting Internet access to a Sex Offender Registry;
- Debating doctor-assisted suicide;
- Disclosing birth parents' identities to adopted children;
- Comments on victims' rights;
- Championing anti-bullying campaigns;
- Protesting against fracking; and
- Opinions on capital punishment.

Judges realize that the judiciary, as an institution, is greater than the sum of its parts. They understand that their words and actions reflect not only on themselves, but on the institution they serve, and therefore on the administration of justice as a whole.

Judges make every effort to avoid conduct and situations that could undermine public confidence in their impartiality. They must not, by their words or actions, appear to have prejudged a case or to favour one of the parties involved in the cases that come before them.

Judges rarely, and only for good reason, speak out publicly on behalf of themselves or the judiciary as an institution. A significant reason is a recognition on the part of judges that to do so might “put them in the fray,” thereby diminishing the way the community would perceive their role and their independence. For the same reason, a great many judges in Canada give up the right to vote following their appointment to the Bench so that they are not in conscience, or in perception, partisan. That choice is a subtle but important reminder of the clear separation between the judicial branch and the legislative and executive branches of government. [\[What is the “separation of powers?”\]](#).

Equally pertinent is the resolute maintenance of judicial silence in the face of media provocation. However, the necessary and deliberate silence of judges means that others must come to their defense. It means that the public, the Bar, and the legal academic community all have a responsibility to be vigilant, and to protest loudly and effectively whenever the members of Canada’s judiciary fall victim to unfair, ill-informed, unwarranted attack.

It is often said that because of the functions they hold, judges are not citizens like others. The judges’ duty of restraint, the obligation to be manifestly impartial and to avoid any conflict of interest required by their judicial functions combined with the citizens’ fundamental right to an impartial trial, imposes some limits on their freedom of speech.

## How are judges accountable?

Judicial accountability ensures that justice is rendered according to the law. Judicial accountability measures are essential to protect the proper application of the Rule of Law, a cornerstone of Canada's constitutional democracy.

Judicial independence does not give judges the right to do whatever they wish. Many measures exist to ensure that judges are held accountable. Probably the greatest limitation is the absolute requirement that cases be decided in open court according to the law and the evidence. Judges have a duty to provide sufficient reasons for their decisions. Reasons for judgment are always in the public domain. Judges are not free agents who can decide cases arbitrarily without regard to the evidence and the law. While they may not be accountable to public opinion, they are nonetheless accountable to the public interest for independent decision-making based upon established and discernable principles of law.

To further ensure judges are accountable, their decisions can be appealed to a higher court. A party who is unsuccessful in court has the right to appeal and, if a higher court finds a legal error has been made, the ruling could be altered or reversed.

Judges are independent but remain accountable for their actions. Court proceedings are open to the public. Journalists and citizens can judge for themselves whether justice has been done. They are free to debate and criticize a judge's decision. Private hearings are rare and only held to protect a person's privacy or other important societal interests, such as children's welfare.

The conduct of judges, inside and outside of their courtrooms, can also be investigated by federal or provincial judicial councils that have been given formal investigating powers to account for their behavior and impose measures or recommend sanctions to be taken by the proper authorities.

For all of these reasons judges are, and are seen to be, accountable for their adjudicative functions. They have sworn an oath to render justice according to law. Their impartiality and independence is constitutionally enshrined. Their independence, impartiality and integrity are presumed as a matter of law. They hear cases, and render judgment in public. Their decisions are subject to appeal. Their reasons are published and may be openly criticized in the press, academic journals or other public discourse. Their conduct as judges, as distinct from their judgments, if found wanting, may be the subject of investigation and sanction by federal and provincial judicial councils. Accountability provides a "check and balance" to satisfy the community that the trust reposed in its judiciary is deserved and that respect for the administration of justice is well founded. It ensures that the authority of judges, whether as individuals or as an institution, is not abused. Such public accountability anchors public confidence in the independence and impartiality of Canada's judiciary. Thus, accountability acts as a safeguard to preserve judicial independence and provide judicial impartiality.

## What are the origins of judicial independence?

Canada's political organization is based on the British parliamentary system [\[What is the "separation of powers?"\]](#). Canada is a federal system of parliamentary democracy. Canada's system of government holds that the law is the supreme authority [\[What is the "Rule of Law?"\]](#). Canada is also a constitutional monarchy: its executive authority is vested formally in the Queen of Great Britain through the [Constitution Act, 1867](#). The country has a multi-party parliamentary system in which many of its legislative practices derive from the unwritten conventions of and precedents set by Great Britain's Westminster Parliament [\[Parliamentary Institutions\]](#). The origins of judicial independence must, therefore, be traced back to the history of Great Britain.

More than 300 years ago, a case arose in England that changed the course of history, especially the role of the judiciary in democratic countries. The abbreviated and best-known name for the case is the Knowles' Trial. In 1692, Chief Justice Holt and Justice Eyre were summoned before a committee of the English House of Lords to explain their reasons for the decision they had rendered. They attended but refused to speak of the reasons for their decision. The response of Chief Justice Holt is reported in part as follows: "I never heard of any such thing demanded of any judge as to give reasons for his judgment. I did think myself not obliged by law to give that answer."

The judges' refusal 300 years ago to give evidence was hardly some academic assertion of abstract privileges or immunities. It was a clear refusal to submit to a parliamentary inquiry into a judicial decision that did not meet with the parliamentarians' approval. This happened in an era when Kings, barons and attorneys general were imprisoned in the Tower of London or beheaded for "crimes" arguably less "treasonous." Those two judges recognized that their independence and the future independence of all judges would cease to exist if they could be called upon to explain their deliberations to a state-sanctioned inquisitorial tribunal.

The courage of the judges in the Knowles' Trial led to the *Act of Settlement, 1701*. By that British statute, the independence of judges to do their job, immune from pressure or outside influence, was enshrined in the law. Up to that point, their selection and tenure depended on the King's pleasure. Beginning with the *Act of Settlement, 1701*, judges' salaries and security of office were guaranteed by law subject only to the requirement that judges hold their offices during good behaviour [\[What are the attributes of judicial independence?\]](#).

By the 1830s, these principles of judicial independence had been extended to judges in Britain's North American colonies, and were later enshrined in the *British North America Act* – the forerunner of our Constitution – in 1867. The *Charter of Rights and Freedoms* (1982) guarantees every Canadian charged with a crime the right to receive a fair trial before a court that is independent and impartial [\[Section 11 d\) Canadian Charter of Rights and Freedoms, Constitution Act, 1982\]](#). Judicial independence is a cornerstone of Canadian democracy. As an institution, the judiciary is independent from all other branches of government, and individual judges are independent not only from government but from each other [\[What is the "separation of powers?"\]](#).

What would be a modern equivalent of the Knowles' Trial? It would be no different than the Prime Minister of Canada calling the Chief Justice to complain about a recent decision of the Supreme Court of Canada and demanding that she come to his office to explain herself. Or the Chief Justice of the Supreme Court of Canada calling upon any member of a trial court or appellate court in any of the provinces or territories of Canada, trying to do the same thing. Either of these approaches would be met with disdain and outrage.

The government prosecutes crimes and often appears as a litigant in the civil courts, so any appearance of impartiality would vanish if government could fire a judge on a whim or slash a judge's salary as punishment for ruling against its position [\[What are the attributes of judicial independence?\]](#). Independence ensures judges are free to assess the evidence, apply the law and decide the outcome of cases without regard for who will be pleased or displeased with the result. Judges have a duty to uphold the Rule of Law, and independence ensures they can fulfil that duty free from outside influences [\[What is the "Rule of Law?"\]](#). Judicial independence ensures cases are dealt with fairly and impartially, and citizens can be confident in the integrity of the results [\[Why is judicial impartiality important to you?\]](#).



## How is judicial independence protected by the Constitution of Canada?

In Canada, judicial independence is constitutionally enshrined by virtue of three sections of the *British North America Act, 1867*, now the [Constitution Act 1867](#) (R.S.C. 1985, App. II) [[The Canadian Constitution: Defining Moments](#)].

With section 96 (the appointing power), section 99 (hold office during “good behaviour”) and section 100 (salaries “fixed and provided”), all federally appointed judges in Canada are entitled to hold office during good behaviour until age 75 and are subject to removal only following a joint address and vote by the Senate and House of Commons [[What are the attributes of judicial independence?](#)].

These constitutional protections extend not just to federally appointed judges but to those judges who are appointed by provincial governments to serve in our Provincial and Family Courts. The independence of the members of those courts is rooted in various sources including, of course, the Constitution, provincial enabling legislation, s. 11 (d) of the Charter, and that body of custom and jurisprudence that has given rise to what former Chief Justice Lamer of the Supreme Court of Canada referred to as “an unwritten constitutional principle” [[Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island \[1997\] 3 S.C.R. 3](#)] [[How has the Supreme Court of Canada defined judicial independence?](#)].

The [Constitution Act, 1867](#) provides the following relating to judicial independence:

<b>Appointment of Judges</b>	<b>96.</b>	The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
<b>Tenure of office of Judges</b>	<b>99.</b>	(1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
<b>Termination at age 75</b>		(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.
<b>Salaries, etc., of Judges</b>	<b>100.</b>	The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

Section 11 d) of the [Canadian Charter of Rights and Freedoms](#) provides:

### Proceedings in criminal and penal matters

**11.** Any person charged with an offence has the right [...]

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

## How has the Supreme Court of Canada defined judicial independence?

The Supreme Court of Canada is the highest court of the country. It can hear cases involving any area of the law and is the final court of appeal for cases originating from all other courts of Canada. As the court of last appeal, the Supreme Court of Canada has made many rulings regarding judicial independence.

[\*Committee for Justice and Liberty c. Canada \(National Energy Board\)\*, \[1978\] 1 S.C.R. 369](#)

[\*Valente v. The Queen\*, \[1985\] 2 S.C.R. 673](#)

[\*R. v. Bearegard\*, \[1986\] 2 S.C.R. 56](#)

[\*MacKeigan v. Hickman\*, \[1989\] 2 S.C.R. 796](#)

[\*R. v. Lippé\*, \[1991\] 2 S.C.R. 114](#)

[\*R. v. Généreux\*, \[1992\] 1 S.C.R. 259](#)

[\*Cooper v. Canada \(Human Rights Commission\)\*, \[1996\] 3 S.C.R. 854](#)

[\*Reference re Remuneration of Judges of the Provincial Court \(P.E.I.\)\*, \[1997\] 3 S.C.R. 3](#)

[\*Canada \(Minister of Citizenship and Immigration\) v. Tobiass\*, \[1997\] 3 SCR 391](#)

[\*R. v. S. \(R.D.\)\*, \[1997\] 3 S.C.R. 484](#)

[\*Therrien \(Re\)\*, \[2001\] 2 S.C.R. 3](#)

[\*Moreau-Bérubé v. New Brunswick \(Judicial Council\)\*, \[2002\] 1 S.C.R. 249](#)

[\*Mackin v. New Brunswick \(Minister of Finance\); Rice v. New Brunswick\*, \[2002\] 1 S.C.R. 405](#)

[\*Ell v. Alberta\*, \[2003\] 1 S.C.R., 857](#)

[\*Doucet-Boudreau v. Nova Scotia \(Minister of Education\)\*, \[2003\] 3 S.C.R. 3](#)

[\*Application under 83.28 of the Criminal Code \(Re\)\*, \[2004\] 2 S.C.R. 248](#)

[\*Provincial Court Judges' Assn. of New Brunswick v. New Brunswick \(Minister of Justice\)\*, \[2005\] 2 S.C.R. 286](#)

[\*British Columbia v. Imperial Tobacco Canada Ltd.\*, \[2005\] 2 S.C.R. 473](#)

[\*Cojocar v. British Columbia Women's Hospital and Health Center\*, \[2013\] S.C.C. 30](#)

[\*Ontario v. Criminal Lawyers' Association of Ontario\*, 2013 SCC 43](#)

The decisions of the Supreme Court of Canada can be found on [LexUM](#).

***Committee for Justice and Liberty c. Canada (National Energy Board)*, [1978] 1 S.C.R. 369**

In [Committee for Justice and Liberty c. Canada \(National Energy Board\)](#), [1978] 1 S.C.R. 369, the Supreme Court of Canada formulated the time-honored legal test that courts apply to determine whether a reasonable person could conclude the judge would be unable to be fair, objective and impartial when hearing a particular case. Justice de Grandpré wrote:

[...] [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

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.”

***Valente v. The Queen*, [1985] 2 S.C.R. 673**

In [Valente v. The Queen](#), [1985] 2 S.C.R. 673, Justice Le Dain explained the fundamental tradition of judicial independence in Canada and in England:

I quote a passage on this subject from the reasons of Howland C.J.O., which refers to the opinions of several learned commentators on the importance of tradition. He said at pp. 431-32:

Having considered the historical development of judicial independence in England and in Canada, it is necessary to refer to the importance of traditions. Quite apart from the Constitution or any statutory provisions, tradition has been an important factor in preserving judicial independence both in England and in Canada. In England a majority of the judges can be removed by the Lord Chancellor, who is an active member of the Government. However, the high tradition of the office of Lord Chancellor has resulted in very few abuses of this power. As Hogg states in his text *Constitutional Law of Canada* (1977), p. 120:

The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.

Shetreet's text *Judges on Trial, a Study of the Appointment and Accountability of the English Judiciary* (1976), emphasized the importance of tradition so far as judicial independence is concerned. At pp. 392-3 he stated:

[...] no executive or legislature can interfere with judicial independence contrary to popular opinion, and survive. “In Britain,” wrote Professor de Smith, “the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion.” (S.A. de Smith *Constitutional and Administrative Law* (1st ed. 1971), pp. 365-366 n. 35) Lord Sankey, L.C., said in Parliament:

“The independence and prestige which our judges have enjoyed in their position have rested far more upon the great tradition and long usage with which they have always been surrounded, than upon any Statute. The greatest safeguard of all may be found along these lines for traditions cannot be repealed, but an Act of Parliament can be.”

The strength of tradition is measured not only by its observance but also by the intensity of the reaction to its violation.[...] Strong public reaction to a breach of tradition demonstrates that the violation will not pass unnoticed.

However, Justice Le Dain wrote that tradition alone was insufficient to protect judicial independence:

Reports and addresses on judicial independence in recent years have indicated that the nature and importance of this constitutional value are not so well and widely understood as to give grounds for confidence that its protection can be safely left to the operation of tradition alone. [...] Important as tradition is as a support of judicial independence, I do not think that reliance on it should go so far as to treat other conditions or guarantees of independence as unnecessary or of no practical importance. [...] Moreover, while tradition reinforced by public opinion may operate as a restraint upon the exercise of power in a manner that interferes with judicial independence, it cannot supply essential conditions of independence for which specific provision of law is necessary.

In [Valente v. The Queen](#), the Supreme Court of Canada stated the three essential conditions of judicial independence: 1) security of tenure; 2) financial security including salary and benefits; and 3) institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function.

### ***R. v. Beauregard*, [1986] 2 S.C.R. 56**

In [R. v. Beauregard](#), [1986] 2 S.C.R. 56, Chief Justice Dickson wrote that the crucial role of the courts “as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.” In his judgment, Chief Justice Dickson affirmed that judicial independence means absence of undue influence not only from the other branches of the State but also from anyone:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

He established a modern conception of judicial independence which includes “both an individual and a collective or institutional aspect.”

The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.

### **MacKeigan v. Hickman, [1989] 2 S.C.R. 796**

In [MacKeigan v. Hickman, \[1989\] 2 S.C.R. 796](#), the Supreme Court of Canada asserted that judicial independence is fundamental as judges are called upon to protect the Canadian Constitution:

To summarize, judicial independence as a constitutional principle fundamental to the Canadian system of government possesses both individual and institutional elements. Actions by other branches of government which undermine the independence of the judiciary therefore attack the integrity of our Constitution. As protectors of our Constitution, the Courts will not consider such intrusions lightly.

In addition, judicial immunity and judicial independence were thoroughly considered by the Supreme Court of Canada in [Mackeigan v. Hickman, \[1989\] 2 S.C.R. 796](#), where McLachlin, J. (as she then was, now Chief Justice of Canada) wrote:

The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence (*Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Beauregard*, [1986] 2 S.C.R. 56). The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard* supports the conclusion that judicial immunity is central to the concept of judicial independence. As stated by Dickson, C.J. [Chief Justice] in *R. v. Beauregard* ([1986] 2 S.C.R. 56), the judiciary if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.

### **R. v. Lippé, [1991] 2 S.C.R. 114**

Chief Justice Lamer of the Supreme Court of Canada explained the link between judicial independence and impartiality in the following way in [R. v. Lippé, \[1991\] 2 S.C.R. 114](#):

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end." If judges could be perceived as "impartial" without judicial "independence" the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite for judicial impartiality.

### **R. v. Généreux, [1992] 1 S.C.R. 259**

The importance of judicial impartiality and its evaluation was described in [R. v. Généreux, \[1992\] 1 S.C.R. 259](#):

To assess the impartiality of a tribunal, the appropriate frame of reference is the "state of mind" of the decision-maker. The circumstances of an individual case must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be subjectively biased in the particular situation. The question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups. (See, for example, the recent judgment of this Court in *R. v. Lippé*, [1991] 2 S.C.R. 114).

In addition, Chief Justice Lamer reiterated that the preservation of judicial independence must fulfil the essential conditions stated in the Constitution of Canada and the decisions of the Supreme Court of Canada:

A tribunal will not satisfy the requirements of s. 11(d) of the Charter if it fails to respect these essential conditions of judicial independence. Although the conditions are susceptible to flexible application in order to suit the needs of different tribunals, the essence of each condition must be protected in every case.

### **Cooper v. Canada (Human Rights Commission), [1996] 3. S.C.R. 854**

In [Cooper v. Canada \(Human Rights Commission\), \[1996\] 3. S.C.R. 854](#), Chief Justice Lamer reaffirmed the importance of judicial independence in relation to the constitutional role of Canadian courts in a system based on the separation of powers:

The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by judicial bodies. Although the judiciary certainly does not have an interpretive monopoly over questions of law, in my opinion, it must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution of Canada, and particularly the *Charter*. The reason is that only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature.

### **Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3**

In [Reference re Remuneration of Judges of the Provincial Court \(P.E.I.\), \[1997\] 3 S.C.R. 3](#), the Supreme Court of Canada emphasised the importance of keeping the three constitutive powers separate. It explained the third component of judicial independence, the institutional or collective financial security. The Court stated the importance of “depoliticizing” the relations between the courts on the one hand and the executive and the legislative powers on the other in the context of setting judicial remuneration:

Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized. As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.

[...]

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.

To be sure, the depoliticization of the relationships between the legislature and the executive on the one hand, and the judiciary on the other, is largely governed by convention. And as I said in *Cooper*, the

conventions of the British Constitution do not have the force of law in Canada: *Reference re Resolution to Amend the Constitution*. However, to my mind, the depoliticization of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as s. 11(d) of the *Charter*, must be interpreted in such a manner as to protect this principle.

The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. Even the most casual observer of current affairs can attest to this. For example, the salary reductions for the judges in these appeals were usually part of a general salary reduction for all persons paid from the public purse designed to implement a goal of government policy, deficit reduction. The decision to reduce a government deficit, of course, is an inherently political decision. In turn, these salary cuts were often opposed by public sector unions who questioned the underlying goal of deficit reduction itself. The political nature of the salary reductions at issue here is underlined by the fact that they were achieved through legislation, not collective bargaining and contract negotiations.

On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence — security of tenure, financial security, and administrative independence — are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.

[...]

With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication. Admittedly, this would be very different from the kind of political interference with the judiciary by the Stuart Monarchs in England which is the historical source of the constitutional concern for judicial independence in the Anglo-American tradition. However, the threat to judicial independence would be as significant.

[...]

The challenge which faces the Court in these appeals is to ensure that the setting of judicial remuneration remains consistent—to the extent possible given that judicial salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature, and that the setting of remuneration from the public purse is, as a result, inherently political—with the depoliticized relationship between the judiciary and the other branches of government. Our task, in other words, is to ensure compliance with one of the “structural requirements of the Canadian Constitution:” *Hunt*. The three components of the institutional or collective dimension of financial security, to my mind, fulfill this goal.

## (2) The Components of Institutional or Collective Financial Security

- (a) Judicial Salaries Can Be Reduced, Increased, or Frozen, but not Without Recourse to an Independent, Effective and Objective Commission



## Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 SCR 391

The Supreme Court in [Canada \(Minister of Citizenship and Immigration\) v. Tobiass, \[1997\] 3 SCR 391](#) recalled the principle evoked in [R. v. Beaugregard \[1986\] 2 S.C.R. 56](#) that the essence of judicial independence is freedom from outside interference. The Supreme Court addressed the test that should be used to ascertain if the issue is compromising the appearance of judicial independence, particularly between the judges' impartiality and the government's interests:

The test for determining whether the appearance of judicial independence has been maintained is an objective one. The question is whether a well-informed and reasonable observer would perceive that judicial independence has been compromised. As Lamer C.J. wrote in *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 139, "[t]he overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality."

The essence of judicial independence is freedom from outside interference. Dickson C.J., in *Beaugregard v. Canada*, [1986] 2 S.C.R. 56, described the concept in these words, at p. 69:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

What emerges from all of this is a simple test for determining whether the appearance of judicial independence has been maintained: whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges.

There are many principles of professional conduct that must be observed in order to maintain the appearance of judicial independence. Two of these are particularly relevant here.

First, and as a general rule of conduct, counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. See the Honourable J. O. Wilson, *A Book for Judges* (1980), at p. 52. The meeting between Mr. Thompson and the Chief Justice, at which counsel for the appellants were not present, violated this rule and was clearly inappropriate, and this despite the fact that the occasion for the meeting was a highly legitimate concern about the exceedingly slow progress of the cases.

Second, and again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. It was therefore clearly wrong, and seriously so, for the Chief Justice to speak to the Associate Chief Justice at the instance of Mr. Thompson. We agree with Pratte J.A. that a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness. Yet, the actions of Isaac C.J. were more in the nature of a response to a party rather than to a problem. Thus, an action that might have been innocuous and even obligatory under other circumstances acquired an air of impropriety as a result of the events that preceded it. Quite simply, it was inappropriate.



**R. v. S. (R.D.), [1997] 3 S.C.R. 484**

In [R. v. S. \(R.D.\), \[1997\] 3 S.C.R. 484](#), the Supreme Court of Canada distinguished between the concepts of objectivity and neutrality in relation to impartiality in the judicial context:

Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias: “a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification.” *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at pp. 842-43.

In order to apply this test, it is necessary to distinguish between the impartiality which is required of all judges, and the concept of judicial neutrality. The distinction we would draw is that reflected in the insightful words of Benjamin N. Cardozo in *The Nature of the Judicial Process* (1921), at pp. 12-13 and 167, where he affirmed the importance of impartiality, while at the same time recognizing the fallacy of judicial neutrality:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs.... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. [...]

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether he [or she] be litigant or judge.

Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, “[t]here is no human being who is not the product of every social experience, every process of education, and every human contact.” What is possible and desirable, they note, is impartiality:

...the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

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

[...]

Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

### ***Therrien (Re)*, [2001] 2 S.C.R. 3**

In [\*Therrien \(Re\)\*, \[2001\] 2 S.C.R. 3](#), the Supreme Court of Canada explained the role of the judge as “A Place Apart” in the following terms:

The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, [...], and *Reference re Remuneration of Judges of the Provincial Court*, [...]. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

In addition, [\*Therrien \(Re\)\*, \(\[2001\] 2 S.C.R. 3](#) described the judge as the pillar of the Canadian justice system and the obligations and responsibility that come with the judicial function:

If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.

(Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.

### **Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249**

In [Moreau-Bérubé v. New Brunswick \(Judicial Council\), \[2002\] 1 S.C.R. 249](#), the Supreme Court of Canada examined the review process of complaints against judges and the relation of this procedure to judicial independence:

Despite provincial variations in their composition, discipline bodies that receive complaints about judges all serve the same important function. In *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, Gonthier J. described, at para. 58, the committee of inquiry in Quebec as “responsible for preserving the integrity of the whole of the judiciary” (also see *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267). The integrity of the judiciary comprises two branches which may at times be in conflict with each other. It relates, first and foremost, to the institutional protection of the judiciary as a whole, and public perceptions of it, through the disciplinary process that allows the Council to investigate, reprimand, and potentially recommend the removal of judges where their conduct may threaten judicial integrity (*Therrien, supra*, at paras. 108-12 and 146-50). Yet, it also relates to constitutional guarantees of judicial independence, which includes security of tenure and the freedom to speak and deliver judgment free from external pressures and influences of any kind (see *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente, supra*).

In light of their functions, judicial discipline committees must be composed primarily of judges. Gonthier J. quoted the work of Professor H. P. Glenn in *Therrien, supra*, at para. 57 to demonstrate this point:

... in the interests of judicial independence, it is important that discipline be dealt with in the first place by peers. I agree with the following remarks by Professor H. P. Glenn in his article “Indépendance et déontologie judiciaires” (1995), 55 *R. du B.* 295, at p. 308:

[translation] If we take as our starting point the principle of judicial independence—and I emphasize the need for this starting point in our historical, cultural and institutional context—I believe that it must be concluded that the primary responsibility for the exercise of disciplinary authority lies with the judges at the same level. To place the real disciplinary authority outside that level would call judicial independence into question.

### **Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, [2002] 1 S.C.R. 405**

In [Mackin v. New Brunswick \(Minister of Finance\); Rice v. New Brunswick, \[2002\] 1 S.C.R. 405](#), the Supreme Court of Canada reaffirmed the fundamental importance of judicial independence based on a strong separation of powers:

The concept of independence accordingly refers essentially to the nature of the relationship between a court and others. This relationship must be marked by a form of intellectual separation that allows the judge to render decisions based solely on the requirements of the law and justice. The legal standards governing judicial independence, which are the sources governing the creation and protection of the independent status of judges and the courts, serve to institutionalize this separation. Moreover, the Preamble to the *Constitution Act, 1867* and s. 11(d) of the *Charter* give them a fundamental status by placing them at the highest level of the legal hierarchy.

The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status (*Valente; Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369). Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The

independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly “communicated” to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.

[...]

In short, I consider that the opinion stated by this Court in the *Provincial Court Judges Reference*, requires that any change made to the remuneration conditions of judges at any given time must necessarily pass through the institutional filter of an independent, effective and objective body so that the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other, remain depoliticized as far as possible. That is a structural requirement of the Canadian Constitution resulting from the separation of powers and the rule of law.

### ***Elliott v. Alberta*, [2003] 1 S.C.R. 857**

In [Elliott v. Alberta, \[2003\] 1 S.C.R. 857](#), Justice Major ruled that the principle of judicial independence must be interpreted in light of the public interest. Moreover, the evolution of our society relies on the independence of the judiciary, a strong respect of the Rule of Law, and of our constitutional order:

The preamble to the *Constitution Act, 1867* provides for Canada to have “a Constitution similar in Principle to that of the United Kingdom.” These words, by their adoption of the basic principles of the United Kingdom’s Constitution, serve as textual affirmation of an unwritten principle of judicial independence in Canada. Lamer C.J. concluded as follows in *Provincial Court Judges Reference*, *supra*, at para. 109:

[...] it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.

The preamble acknowledges judicial independence to be one of the pillars upon which our constitutional democracy rests.

The historical rationale for independence was to ensure that judges, as the arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference (*R. v. Beauregard* [1986] 2 S.C.R. 56). The integrity of judicial decision making depends on an adjudicative process that is untainted by outside pressures. This gives rise to the individual dimension of judicial independence, that is, the need to ensure that a particular judge is free to decide upon a case without influence from others.

In modern times, it has been recognized that the basis for judicial independence extends far beyond the need for impartiality in individual cases. The judiciary occupies an indispensable role in upholding the integrity of our constitutional structure: see *Provincial Court Judges Reference*, *supra*, at para. 108. In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals. Dickson C.J. described this role in *Beauregard*, *supra*, at p. 70:

[Courts act as] protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.

The institutional dimension of judicial independence was also recognized in [Eli v. Alberta, \[2003\] 1 S.C.R. 857](#):

This constitutional mandate gives rise to the principle's institutional dimension: the need to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government.

Finally, the Supreme Court of Canada affirmed the links between the principle of judicial independence and public trust in the administration of justice:

Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it" (*Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405). The principle requires the judiciary to be independent both in fact and perception.

### **Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3**

In [Doucet-Boudreau v. Nova Scotia \(Minister of Education\), \[2003\] 3 S.C.R. 3](#), the Supreme Court of Canada reflected on the role of the courts in a system governed by the Rule of Law and grounded in the separation of powers:

Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement. In this respect, courts play an essential role since they are the central institutions to deal with legal disputes through the rendering of judgments and decisions. But courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments.

Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.

[...]

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

### **Application under 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248**

[Application under 83.28 of the Criminal Code \(Re\), \[2004\] 2 S.C.R. 248](#) confirmed the origins of judicial independence:

Judicial independence further represents the cornerstone of the common law duty of procedural fairness, which attaches to all judicial, quasi-judicial and administrative proceedings, and is an unwritten principle of the Constitution.

Justices Iacobucci and Arbour explained in [Application under 83.28 of the Criminal Code \(Re\); \[2004\] 2 S.C.R. 248](#) that even if the conditions to preserve judicial independence are met, judicial independence is ensured only if tribunals are free to apply their jurisdictional function without interference:

The function of the judge in a judicial investigative hearing is not to act as “an agent of the state,” but rather, to protect the integrity of the investigation and, in particular, the interests of the named person vis-à-vis the state.

### **Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice), [2005] 2 S.C.R. 286**

[Provincial Court Judges' Assn. of New Brunswick v. New Brunswick \(Minister of Justice\), \[2005\] 2 S.C.R. 286](#) reiterated the important principle of judicial independence and the need to maintain independence both in fact and in public perception in the context of judicial remuneration:

Litigants who engage our judicial system should be in no doubt that they are before a judge who is demonstrably independent and is motivated only by a search for a just and principled result.

The decision provides a short summary of the different elements constituting judicial independence and its *raison-d'être*:

The basis for the principle of judicial independence can be found in both our common law and the Canadian Constitution; see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 70-73; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at paras. 18-23. Judicial independence has been called “the lifeblood of constitutionalism in democratic societies” (*Beauregard*, at p. 70), and has been said to exist “for the benefit of the judged, not the judges” (*Ell*, at para. 29). Independence is necessary because of the judiciary’s role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process; *Beauregard*, at p. 70.

There are two dimensions to judicial independence, one individual and the other institutional. The individual dimension relates to the independence of a particular judge. The institutional dimension relates to the independence of the court the judge sits on. Both dimensions depend upon objective standards that protect the judiciary’s role: *Valente*, at p. 687; *Beauregard*, at p. 70; *Ell*, at para. 28.

The judiciary must both be and be seen to be independent. Public confidence depends on both these requirements being met: *Valente*, at p. 689. “Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice.” *Ell*, at para. 29.

The components of judicial independence are: security of tenure, administrative independence and financial security; see *Valente*, at pp. 694, 704 and 708; the *Reference*, at para. 115; *Ell*, at para. 28.

This judgment also explained that the ultimate goal of the judges’ professional organization is to separate the questions regarding their status and remuneration from those related to their decisions’ consequences in our social system. Judicial independence served not as an end in itself, but as a means to safeguard the constitutional order and to maintain public confidence in the administration of justice:



In some provinces and at the federal level, judicial commissions appear, so far, to be working satisfactorily. In other provinces, however, a pattern of routine dismissal of commission reports has resulted in litigation. Instead of diminishing friction between judges and governments, the result has been to exacerbate it. Direct negotiations no longer take place but have been replaced by litigation. These regrettable developments cast a dim light on all involved. In order to avoid future conflicts such as those at issue in the present case, the principles of the compensation commission process elaborated in the Reference must be clarified.

### **British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473**

In [British Columbia v. Imperial Tobacco Canada Ltd., \[2005\] 2 S.C.R. 473](#), Justice Major emphasised the importance of respecting the Rule of Law's principles:

This Court has described the rule of law as embracing three principles. The first recognizes that “the law is supreme over officials of the government as well as private individuals and thereby preclusive of the influence of arbitrary power.” *Reference re Manitoba Language Rights*, at p. 748. The second “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.” *Reference re Manitoba Language Rights*, at p. 749. The third requires that “the relationship between the state and the individual ... be regulated by law.” *Reference re Secession of Quebec*, at para. 71.

So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state official's actions, be legally founded. See R. Elliot, “References, Structural Argumentation and the Organizing Principles of Canada's Constitution” (2001), 80 Can. Bar Rev. 67, at pp. 114-15.

In addition, this decision described the role of judges in relation to the law:

It follows that the judiciary's role is not, as the appellants seem to submit, to apply only the law of which it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent. Nor is it to second-guess the law reform undertaken by legislators, whether that reform consists of a new cause of action or procedural rules to govern it. Within the boundaries of the Constitution, legislatures can set the law as they see fit.

Moreover, Justice Major explained that the recognition of a judicial function protected by the constitutional guarantee of judicial independence is not the equivalent to judicial governance:

In essence, the appellants' arguments misapprehend the nature and scope of the courts' adjudicative role protected from interference by the Constitution's guarantee of judicial independence. To accept their position on that adjudicative role would be to recognize a constitutional guarantee not of judicial independence, but of judicial governance.

### **Cojocaru v. British Columbia Women's Hospital and Health Center, [2013] S.C.C. 30**

In [Cojocaru v. British Columbia Women's Hospital and Health Center, \[2013\] S.C.C. 30](#), the Supreme Court of Canada explained the presumption of judicial integrity and impartiality in the following terms:

Society entrusts to the judge the weighty task of deciding difficult issues of fact and law in order to resolve disputes between citizens. Judges are appointed from among experienced lawyers and are sworn to carry out their duties independently and impartially.

Judicial decisions benefit from a presumption of integrity and impartiality: a presumption that the judge has done her job as she is sworn to do. This reflects the fact that the judge is sworn to deliver an impartial verdict between the parties, and serves the policy need for finality in judicial proceedings.

In this decision, the Supreme Court explored the notion of judicial integrity and described the burden of proof required to set aside this presumption:

The presumption of judicial integrity and impartiality means that the party seeking to set aside a judicial decision because the judge's reasons incorporated the material of others bears the burden of showing that a reasonable person, apprised of the relevant facts, would conclude that the judge failed to come to grips with the issues and deal with them independently and impartially.[...]

The threshold for rebutting the presumption of judicial integrity and impartiality is high. The presumption carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption [...]

In all cases, the underlying question is the same: would a reasonable person, apprised of all the relevant circumstances, conclude that the judge failed to come to grips with the issues and make an impartial and independent decision, thereby defeating the presumption of judicial integrity and impartiality?

### **Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43**

The normative force of the separation of powers has been recognized by the Supreme Court of Canada on multiple occasions. Justice Karakatsanis reiterated the fundamental principles in [Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43](#) in the following terms:

Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

[...] the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

It is vital that each branch of government respect its proper institutional role and capacity in the administration of justice, in accordance with the Constitution and public accountability.