



## B. Resource Materials

### I. The Need for Impartiality

**T**he *Charter* enshrines the right of persons accused of crimes to have their cases heard “by an independent and impartial tribunal.” This right would be meaningless if citizens did not have confidence that judges approach a case with an open mind and free of ties to those involved in a case. “The rule of law, interpreted and applied by impartial judges, is the guarantee of everyone’s rights and freedoms,” Antonio Lamer, a former chief justice of the Supreme Court of Canada, has said. “Judicial independence,” he added, “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 our courts apply is whether a reasonable person could conclude that the judge would be unable to be fair, objective and impartial when hearing a particular case.

### 2. Maintaining the Appearance of Impartiality

#### a) Grounds for Disqualification from Hearing a Case

**J**udges 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 ties. For example, a judge with knowledge of (or owning shares in) a company involved in a lawsuit would likely declare that fact to the parties and, depend-

ing on their views, might decide to disqualify himself or herself from hearing the case—also known as “recusing.” In that same way judges would seek to avoid potential conflicts by declining to preside, for some period of time, in

cases arising from their former work as a lawyer or involving lawyers from the judge’s former law firm or place of business. After a judge is appointed, a “cooling off” period of two or more years is often recommended before the judge agrees to hear cases involving former clients, business associates or members of the judge’s old law firm. Resolving such matters is most often a matter of propriety, proximity and common sense. For example, there may be no dispute about a judge presiding over a case where his nephew works in the mail room of one of the law firms involved; whereas more difficult questions arise where the judge’s husband is a partner in that law firm.

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#### b) Conduct Outside the 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.” A judge must show respect for the law in his or her 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. But by the same token, they

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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. 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.

“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. D. S. v. The Queen*. “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.”

### c) Conduct Inside the 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. Judges must strive to treat each party and witness with courtesy and civility. It is the judge's job 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.”

### d) 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 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.

If a judge was 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. 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.

Judges cannot take on paying work outside of their judicial duties. 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 royal commission, public 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.

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### 3. Understanding Civil Law

**T**he civil courts settle a wide range of legal disputes that arise between citizens of a complex modern society. A person or a corporation can sue the party responsible for injuries or losses resulting from an accident, a business deal gone sour or a malicious act that falls short of a crime. For example, a dispute may arise over the sale of a home or where the survey line runs between adjoining properties. A company or inventor may claim that a rival has stolen ideas and infringed on a patent. An employee demoted or fired may sue his employer, claiming wrongful dismissal. Shareholders may sue the directors of a corporation for breaching their duty to run the company in a way that protects the interests of investors. When married couples separate, they turn to the courts to grant a divorce and to settle disputes over support payments, which parent will have legal custody of the children and the terms of parental access to the children.

Many civil actions involve claims for money to compensate for the harm that someone suffers due to the actions or failings of someone else. These are known as torts and most are based on acts of negligence that cause personal injury, such as traffic accidents and medical malpractice. To determine

whether such claims are valid, a judge or jury will compare the defendant’s conduct to the standard of care that is reasonable in the circumstances. A nuisance claim can be made against someone who interferes with a person’s right to enjoy their property—people living near a factory that produces a stench could sue for damages or for an injunction to suppress the odour. Battery is the tort of assault, and the victim of an assault or beating can sue for damages as well as file a complaint asking the police to consider filing criminal charges.

The law of contracts is concerned with the promises and duties that have been agreed to between parties. For instance, if a person agrees to buy a car from a dealership at a specific price, and the car dealer refuses to complete the transaction, the would-be buyer may have the right to sue for breach of contract. Most contracts are set out in writing but a court will enforce the terms of a valid verbal contract.

### 4. Procedure in Civil Cases

**C**ivil actions start with a written application to the court or documents known as pleadings, depending on the nature of the legal action or lawsuit. The document in which a plaintiff launches a lawsuit, and pleads his or her case, is known as an originating notice and statement of claim. It names the plaintiff or plaintiffs, identifies the defendants, recites the facts and allegations that form the basis for the claim, and indicates the damages or other remedies sought. If defendants plan to fight the lawsuit, they must file a statement of defence that denies some or all of the allegations. Failure to file a defence by a certain deadline (usually within a few weeks) may cause a judge to grant a default judgment—an order requiring the defendants to pay damages to the plaintiff. A defendant may launch a lawsuit known as counterclaim, seeking damages from the plaintiff for alleged wrongdoing related to the initial claim. A defendant who contends others are fully or partly to blame for the plaintiff’s losses can file a third-party action that draws those parties into the lawsuit and adds them as defendants.

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Most civil cases are bound for trial in the superior court, where there is no limit on the amount or type of damages that can be awarded to a successful plaintiff. (Small claims courts hear disputes involving smaller amounts of

money and modest claims for damages—in most provinces, these courts can deal with disputes involving no more than \$15,000.) After the pleadings stage, the two sides exchange letters, memos, experts' reports and other documents relevant to the claim. Then lawyers for each party have the right to question the opposing side's witnesses at private sessions known as examinations for discovery. At these hearings, witnesses take an oath to tell the truth but their testimony remains private unless it is produced at the trial or as part of a pre-trial hearing. This is the fact-finding stage of a lawsuit, enabling each side to assess the strengths and weaknesses of its case and to decide whether it makes sense to seek a settlement or to proceed to trial. Most lawsuits are settled out of court before trial, and courts in some provinces require litigants to take part in pre-trial conferences, chaired by a judge, to explore the possibility of a settlement. If there is no settlement, the lawsuit proceeds to a trial. [How a civil trial unfolds is discussed in the Teacher's Guide for Unit 3.]

Sometimes a party is applying for quick action, such as an injunction to stop a building from being demolished, or to have a law interpreted or struck down as unconstitutional. Since such applications focus on legal issues, the procedure is streamlined—legal arguments are filed with the court in writing and most evidence is presented in written declarations known as affidavits.