

CASE STUDY:

Judges and the Rule of Law

Judges are highly-trained experts in the law. They decide all kinds of cases, including cases that ask whether or not the government is obeying the rule of law.

When judges make decisions, they must look beyond the politics of the moment. A case can only be decided based on what the law says and what the facts of the case are. This requires judges to be independent, impartial, and fair-minded. Cases cannot be decided on a whim, or in a way that simply pleases judges.

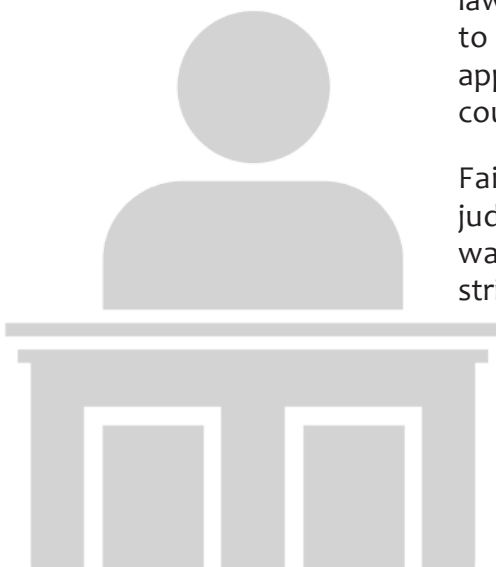
Even though judges must be independent, impartial, and fair-minded, judges have opinions and sympathies. After all, making a conclusion about a case requires that an opinion be rendered. How judges balance being impartial with having opinions was spelled out in the case *R.D.S. v. The Queen*:

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. This is why judges must treat everyone who appears in their court fairly and even-handedly. This is also why judges will not be pressured into making particular decisions by the government, the police, or private citizens.

Surveys show that Canadians believe our judges are doing a good job of rendering justice. Judges are independent, impartial, and objective because they do not act to fulfill a political agenda: instead, they act to ensure that the law is followed and the rule of law remains secure.

Nevertheless, judges are not perfect. When they make decisions, opinions about those decisions will vary. And occasionally, judges make mistakes. Because Canada is a country that follows the rule of law, court decisions can be criticised, and if the decision is believed to include an error in application of a law, the decision can be appealed to a higher court. This system of checks ensures that the court system as a whole makes fair decisions.

Fair decision-making is only one of the ways that Canada's judges maintain their high level of respect. Another important way that judges preserve their reputation is by adhering to strict ethical principles.



Ethical Principles for Judges

Federally-appointed judges in Canada follow a complex set of ethical principles. These principles, created by the Canadian Judicial Council, provide guidelines for how judges should behave in the courtroom and in the community.

The Canadian Judicial Council's *Ethical Principles for Judges* state that judges should not:

- engage in public debates about their decisions. Judges often spell out the reasons for their decisions in writing, or explain them in the courthouse. There is an expectation that these decisions will speak for themselves;
- participate in public discussions or hold membership in groups that address major social issues (with the exception of issues that directly affect the operation of Canada's courts). This is to help preserve the judiciary's reputation as being as non-biased as possible; and
- participate in partisan political activities. This is to ensure that judges remain above the political fray.

It is believed that when judges hold themselves to high ethical principles, their standing in the community will remain high. As well, holding themselves to ethical principles helps to maintain a common understanding that judges make their decisions impartially, based on what the law says and what the facts of the cases are.

If a judge is believed to have violated these ethical principles, members of the public can make formal complaints. If the complaint is warranted, the judge could be subjected to disciplinary action.

While instances of judges running afoul of ethical principles are infrequent, they do happen. For example, in late 2016 a judge in Hamilton wore a "Make America Great Again" Donald Trump hat in court. The incident sparked 81 complaints to the Ontario Judicial Council. The Women's Legal Education and Action Fund (LEAF)—one of the complainants—was concerned that the judge's "partisan display raises the appearance of, or apprehension of, a lack of impartiality, contrary to the principles of judicial ethics."

The Judicial Council largely agreed with the complainants. They ruled that the incident was a single aberrant and inexplicable act of judicial misconduct on behalf of the offending judge. He was suspended for 30 days.

Fortunately, cases such as the judge wearing the Trump hat are the rare exception in Canada. The overwhelming majority of judges consistently hold themselves to high standards, stay out of the day-to-day fray of community organisation and politics, and come to impartial decisions based on what the law says and what the facts of the case are. By acting as arbiters of the law, and not as political agents, judges help preserve the rule of law in Canada.

DISCUSS

1. Why would it be a concern if a judge wore a ball cap with a political slogan to court?
2. The 81 complaints lodged against the hat-wearing judge outnumbered all complaints the judicial council received against all judges in the previous three years. What does the uproar tell us about political sensitivities, and the notion that judges must remain outside of partisan politics?
3. What would happen to the legal system if judges began to show strong political bias? How would politicians react? How would the public react?
4. Look back at this statement about judicial impartiality:

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. This is why judges must treat everyone who appears in their court fairly and even-handedly.

How does this statement reflect the liberal ideal of reason?