

HANDOUT 2: The Rule of Law & Judicial Independence

The Rule of Law

While some countries carry out their laws by intimidating or bullying their citizens (sometimes even arresting and throwing people into prison without a trial) here in Canada we expect our laws to operate and be carried out differently. We expect to be protected by our laws and treated fairly. We follow the rule of law, a principle of justice. This principle means that individuals must recognize and accept that we need laws to regulate society. We all live near other people and must find a way to live together peacefully. Laws exist to help us do this.



The rule of law expresses the principle that all people are equal under the law. No one is above the law, whether he or she is a politician, police officer, corporation or wealthy individual. The courts exist to ensure that everyone is accountable to the law. The role of judges and lawyers is to protect the rights and freedoms of citizens. The role of judges is to protect the rights and freedoms guaranteed under the Charter.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

— *Canadian Charter of Rights and Freedoms*

The Law Society of BC's Report of the Independence and Self-Governance Committee noted that the rule of law is a fundamental principle underlying Canadian democracy. The preamble of the Charter of Rights and Freedoms states that the rule of law is one of the principles upon which Canada was founded. The rule of law was recognized as a fundamental principle, however, even before the existence of the Charter. In *Roncarelli v. Duplessis*, for example, the court noted that the rule of law is a "fundamental postulate of our constitutional structure."

The rule of law is required to provide impartial control of the use of power by the state. It guards against arbitrary governance. To be effective, the rule of law requires not only the submission of all to the law, but also the separation of powers within the state. The rule of law is needed to control the powers of the state. There must be a separation among those who make the law, those who interpret and apply it, and those who enforce it.

As has been pointed out in a discussion paper prepared by a past president of the International Bar Association, this separation of powers requires an independent judiciary; an efficient, functioning court system; and a strong, independent and properly qualified legal profession to support it. An independent legal profession is also essential to preserve

citizens' rights and freedoms under the rule of law by guaranteeing them access to independent, skilled, confidential and objective legal advice.

A failure to maintain separation of powers can result in the executive branch of government interfering with the independence of the judiciary and lawyers. This erodes the rule of law and the protections it affords.

Judicial Independence

The concept of judicial independence is the cornerstone of our justice system and is necessary to protect the rule of law. As the Right Honourable Brian Dickson, P.C., C.C., former Chief Justice of the Supreme Court of Canada once explained:

“The tradition of law which we share is a living thing, built by lawyers and judges imbued with a love of individual freedom and a dedication to justice for all, according to the law. The legal doctrines that we have inherited constitute not the bare bones of a dead tradition but a vital body of living experience. It is only where the law is interpreted by an independent judiciary with vision, a sense of purpose and a profound sensitivity to society's values, that the rule of law, and therefore the citizen's rights and freedoms, are safe.”

Judges Must be Independent of Government

Judicial independence means that judges are free to make decisions without interference or influence from any source, including elected officials such as MLAs or MPs. The state cannot tell a court or judge how to decide a case, nor can it discipline a judge for deciding a case in a particular way.

Judges Must be Impartial

It is the constitutional right of every Canadian to have his or her legal issues decided by a fair and impartial judicial decision-maker.

Judges have a responsibility to listen to both sides of a case and then to make impartial, fair decisions based on the law and on the evidence before them. If a judge felt pressure from the government to decide a case in a particular way, the result would be unfair to anyone with a competing interest in the case. The rights of individual citizens would not be protected.

Furthermore, since the government is frequently one of the parties in matters before a judge, the other parties must be confident that the judge is not influenced by the government. This judicial impartiality exists despite the fact that judges are appointed and paid by the government. All parties must be assured that judges make decisions based on the application of the law to the facts of the case and on no other considerations.

Judges Must be Accountable

Despite their independence, judges are accountable for their decisions. Their decisions can be examined by a higher court — they can be appealed. Judges are also responsible to the courts. A judge would never refuse to hear a case because of its difficulty or unpopularity. Occasionally, however, a judge must refuse to hear a case because he or she has a connection with one of the parties or some other conflict of interest.

Where the conflict is minor, the judge may disclose the connection to both parties and allow the lawyers in the case to raise any concerns they have with the judge continuing to hear the case. It is important that both parties feel confident that the judge will be impartial. For example, if the case involved the judge's neighbour, then the neighbour or the judge might feel uncomfortable with the judge hearing the case because they have a relationship outside the courtroom. The other party might also be concerned that the relationship between the judge and the neighbour could, even unintentionally, influence the case. Even the appearance of bias can be important, and may justify disqualifying a judge from hearing a case.



Judicial Appointment

In Canada, judges are appointed by the Governor in Council following recommendations by committees made up of judges, lawyers and “lay persons” (people from the community). These committees make recommendations to either the provincial or federal government. Provincial Court judges are appointed by the Attorney General of the provincial government, and judges in the Supreme Court of Canada, the Supreme Court of BC and the Court of Appeal for BC are appointed on the recommendation of the federal minister of justice or the Prime Minister.

Politicians and civil servants do not control judges, nor does the Prime Minister. Once appointed, judges must answer only to the law and their own conscience. No judge may hold any other remunerative office under the federal or provincial government, nor engage in any business enterprise. Judges must devote themselves exclusively to their judicial duties.

Judges must make decisions without being influenced by the government that appointed them or by society. For this reason, federally appointed judges are appointed to “the bench” until the age of 75; provincial court judges are appointed until age 70. They receive a fair salary that is not subject to control by those who might want to influence them.