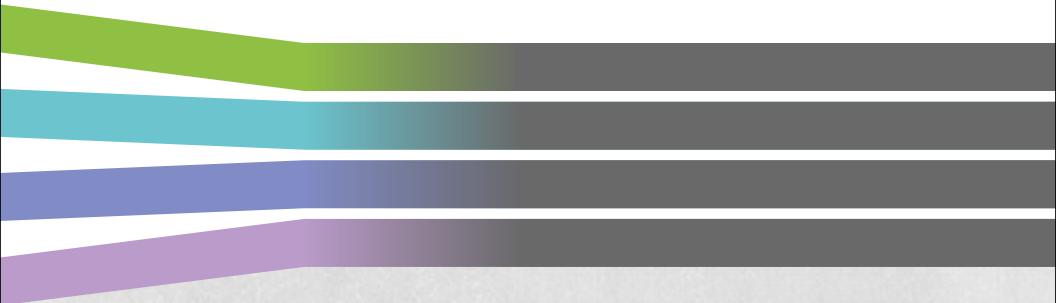


QUÉBEC'S SECULARISM REQUIREMENTS

Thoughts on How They Affect
the Judge's Duty of Actual
and Apparent Neutrality



NEUTRALITY
IMPARTIALITY
OBJECTIVITY



The Conseil de la magistrature is responsible for establishing and enforcing rules for judges and presiding justices of the peace of the Court of Québec and the municipal courts based on the requirements flowing from the secular nature of the State.¹ The intent of this document is to report on the outcome of the Conseil de la magistrature's work in meeting this obligation.

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In the course of its research, the Conseil first noted that the requirements relating to secularism aim to ensure that citizens have access to neutral and impartial judges. Yet, these requirements are already embedded in the ethical duty of every judge to be clearly impartial and objective.²

In this context, the Conseil has developed a guide to help judges reflect on visible religious symbols worn in the exercise of their functions. This reflection is in line with the judge's ethical duty of *real* and *apparent* impartiality as conceived by society. Obviously, the proposed reference tool in no way commits current and future members of the Conseil de la magistrature who may be called upon to receive and examine complaints alleging a breach of ethics made against a judge.

OVERVIEW

The *Act respecting the laicity of the State* came into effect on June 16, 2019. From the outset, it sets out Québec's secularism, which it bases on the following four principles:

Separation
of religion
and state

Religious
neutrality
of Québec

Equality
of all citizens

Freedom
of conscience
and freedom
of religion

Judicial institutions, particularly, must, in the course of their work, comply with these principles “in fact and in appearance.” These institutions include the Court of Québec, the Human Rights Tribunal, the Professions Tribunal and municipal courts.

Section 5 of the *Act* tasks the Conseil de la magistrature du Québec with establishing rules reflecting the requirements of Québec’s secularism and ensuring their implementation. This choice by Parliament is in keeping with the fundamental principle of institutional judicial independence, which requires that judges must themselves infer the impact of the secularism rule on the exercise of judicial power.³

Lastly, the *Act* prohibits the wearing of religious symbols by persons specifically listed in an appendix.⁴ Judges are not included in this list. Again, this is understandable since it would be difficult to imagine a law that would ignore the fundamental principle of judicial independence and force judges to interpret their duty of real and apparent neutrality.

There is, moreover, no other rule expressly prohibiting judges from wearing a visible religious symbol in the performance of their duties.⁵ Judicial ethics therefore appear to be the appropriate angle of analysis for questioning the scope of secularism requirements. The focus should, therefore, remain on substantive issues related to the act of judging, independent of government policy directions.

**JUDICIAL ETHICS
THEREFORE APPEAR
TO BE THE APPROPRIATE
ANGLE OF ANALYSIS FOR
QUESTIONING THE SCOPE
OF SECULARISM
REQUIREMENTS.**

In light of this, Section 5 of the *Act* naturally begs the question as to whether the current provisions as well as the constitutional and legal principles guiding a judge’s behaviour are sufficient to prompt reflection on the ethical conduct to be expected regarding the requirements of secularism and, more specifically, the wearing of visible religious symbols.

Let us first look at the general rules of this framework.



Judicial ethics and values

JUDICIAL CODE OF ETHICS

The Conseil de la magistrature du Québec is responsible for adopting a code of ethics by regulation.⁶ The Chief Judge of the Court of Québec and the associate chief judge responsible for municipal courts must ensure compliance with judicial ethics.⁷

The Code of Ethics sets out the rules of conduct and the duties of judges toward the public, the parties to a proceeding, and the lawyers. It also sets out acts and omissions derogatory to a judge’s honour, dignity, or integrity.⁸

First and foremost, the code does not prescribe behaviour that is likely to deviate from the fundamental values it enacts.⁹ As such, the rules of professional conduct do not prohibit the judiciary from acting or behaving in a predetermined manner, both in court or in public. Rather, they are meant to establish standards of conduct, in line with public expectations, reflecting the ideal behaviour judges must aspire to, i.e., “to aim for perfection.”¹⁰

In this case, the requirements of secularism call into question the judge's duty to *be seen to be* impartial and objective (s. 5 of the *Judicial Code of Ethics*).¹¹

This ethical duty has been the subject of considerable jurisprudence and numerous articles of doctrine. Let us take a look at some of the principles that emerge from this analysis and that seem to apply to secularism.

THE JUDGE'S DUTY OF IMPARTIALITY

What does impartiality imply

Regardless of their background, gender, ethnic origin or race, all judges are subject to the fundamental duty to *be* and to *appear to be* impartial.¹² Indeed, the legitimacy of the judiciary also rests on a symbolic aspect: the appearance of impartiality. 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.¹³

IMPARTIALITY

Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. It implies absence of bias, actual or perceived,¹⁴ and includes a requirement to disclose a case of recusal.¹⁵

PARTIALITY

In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.¹⁶

Impartiality and the absence of bias have developed as both legal and ethical requirements.¹⁷

The expected neutrality does not, however, require judges to discount their life experience or to have no pre-existing views, opinions, sympathy, or sensitivity.¹⁸ A judge's identity and experiences are an important part of *who they are*, and neither neutrality nor impartiality is *inherently* compromised by them.¹⁹

Again, the judge's identity and experiences must not prevent them from approaching each case with an open mind, free from inappropriate and undue assumptions.²⁰

As mentioned earlier, judges must be particularly sensitive to the need not only to be fair but also to *appear to* all reasonable observers to be fair to people of every race, religion, nationality, and ethnic origin. Behaviours or remarks that would pass unnoticed in other, more homogeneous societies could well raise a reasonable apprehension of bias in Canada.²¹

JUDGES MUST BE PARTICULARLY SENSITIVE TO THE NEED NOT ONLY TO BE FAIR BUT ALSO TO APPEAR TO ALL REASONABLE OBSERVERS TO BE FAIR TO PEOPLE OF EVERY RACE.

Judges must be constantly vigilant and jealously guard their impartiality, as their duty to do so exists on an ongoing basis.²² Judges must be conscious of this constant “judging” and that their behaviour and every comment made from the bench is weighed and evaluated by the community as well as the parties.²³ The conduct and image that a judge projects affect the judicial system as a whole and, therefore, the confidence that the public places in it.²⁴ Judges must strive to ensure that no word or action during the course of a trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.²⁵

Presumption of impartiality arising from the judge’s oath

Often the most significant occasion in the career of a judge is the swearing of the oath of office, which requires them to render justice impartially.²⁶ By taking their oath, judges not only swear, to the public, 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.²⁷

Judicial decisions benefit from a presumption of integrity and impartiality under the oath of office.²⁸ Hence, the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision.²⁹

Reasonable apprehension of bias

The test for a reasonable apprehension of bias is undisputed and has been articulated as follows: what would an informed person conclude, viewing the matter realistically and practically and having

thought the matter through.³⁰ This person must have knowledge of all the relevant circumstances, including the historical traditions of judicial impartiality and integrity.³¹

This test remains the same whether applied to judicial conduct in the course of a proceeding or with “extra-judicial” issues like a judge’s identity, experiences or affiliations.³²

An allegation of apparent bias, real or apparent, must be carefully considered since it calls into question judicial integrity. A real likelihood or probability of bias must be demonstrated because a mere suspicion is not enough.³³

All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias.³⁴

Thus, the Supreme Court of Canada considers membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not *alone* a basis for concluding that a perception of bias can reasonably be said to arise.³⁵ The Court adds here that efforts made to create a more diverse bench must not be undermined by any presumption that a judge’s identity closes the judicial mind.³⁶

Similarly, bias is not assumed. For example, in racial matters, “a judge who happens to be black is no more likely to be biased in dealing with black litigants than a white judge is likely to be biased in favour of white litigants.”³⁷

ALL JUDGES OF EVERY RACE, COLOUR, RELIGION, OR NATIONAL BACKGROUND ARE ENTITLED TO THE SAME PRESUMPTION OF JUDICIAL INTEGRITY AND THE SAME HIGH THRESHOLD FOR A FINDING OF BIAS.³⁴

Moreover, the impugned comments or other conduct must not be looked at in isolation. Rather, it must be considered in the context of the circumstances and based on the facts.³⁸ A judge is not biased in an absolute sense, but in relation to the parties or the issues in a case.³⁹

Finally, however, actual bias need not be established since it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.⁴⁰

Wearing a visible religious symbol as a trigger for apprehension of bias

Could the wearing of a visible religious symbol by the judge in the performance of their duties, in and of itself, give rise to a reasonable apprehension of bias under the Supreme Court's analysis? Since such an apprehension must be weighed, from the jurisprudential perspective, against the circumstances of a case, the wearing of a religious symbol would not be sufficient to overturn the presumption of a judge's impartiality.

That said, has the *Act* changed the status of the law, for example, in terms of the characteristics of the "reasonable person" based on which an apprehension of bias must be examined? Remember that, according to the Supreme Court, this person "should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or [...] bias in a particular community," in addition to being aware of "the traditions of integrity and impartiality." But does the legislator's decision to include Québec in a tradition of secularism change the referential framework for the "reasonable person"? In other words, in the Québec context, should the reasonable person be mindful of a secular tradition of apparent neutrality of judges?

It is unclear whether the Supreme Court would adopt such an interpretation. However, in Québec, some litigants may interpret such a view of the judge's duty of neutrality for grounds of a complaint against a judge who decides to wear a religious symbol.⁴¹

THE JUDGE'S DUTY TO ACT IN A RESERVED MANNER

The judge's duty to act in a reserved manner⁴² is an additional guarantee of judicial independence and impartiality.⁴³ From this perspective, it requires that judges be shielded from tumult and controversy that may taint the perception of impartiality to which their conduct must give rise.⁴⁴

As noted above, the parties must be assured that the judge is not biased in favour of or against anyone, that they are willing to hear the evidence with an open mind, and that their decision will be based on the facts and their application of the law and not on their personal beliefs and allegiances. Accordingly, the judge should avoid expressing moral convictions, political opinions or beliefs in relation to religion, at the risk of appearing to favour one of the parties or a particular outcome. Wearing a religious sign or symbol is an expressive act: it communicates the religious affiliation of the person wearing it. Does such behaviour violate the judge's duty to act in a reserved manner?

A judge may have religious beliefs without feeling the need to display a religious symbol. However, certain religious elements – i.e., certain ways of experiencing one's faith – include practices and rituals, many of which concern the believer's dress code.

Once again, this raises the question of the judge's *real* and *apparent* impartiality. It is hard to understand why it should be considered, *in principle*, that those who display their religious affiliation are less capable of impartiality and discernment than those who do not.

Similarly, as we have seen with impartiality requirements, it would be untenable to think that the judge should always share the relevant elements of how the parties see themselves.

That said, some agents more strongly embody the state's authority and coercive power. We note that this fact seems to have been retained in the *Act respecting the laicity of the State*⁴⁵ as one of the rationales for imposing an even stricter duty to act in a reserved manner on them. Ethically speaking, does this observation lead to a different analysis?

CONSIDERATIONS

From the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, recognize the person rights or impose obligations on them.⁴⁶ In the eyes of the external observer, 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.⁴⁷ In this context, what is demanded of them is something far above what is demanded of their fellow citizens.⁴⁸ The appointment to the position of judge also entails a certain loss of freedom for the person who accepts it. Both inside and outside the courtroom, a certain reconciliation of the values governing the judiciary with the individual rights and freedoms of the judge seems inevitable.

That said, ethical rules are difficult to define in detail. Rather, they "call for better conduct" not through the imposition of various sanctions but through compliance with personally imposed constraints.⁴⁹

The ethical obligations of members of the judiciary do not depend on a formal framework of codes. As we have seen, they stem both from the commitment made by judges when they swear their oath and from the existence of obligations *inherent* in the judicial role.⁵⁰

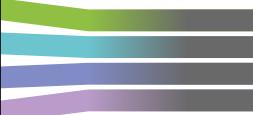
These duties, including those of real and apparent impartiality and acting in a reserved manner, nevertheless provide the basis for the judge to reflect on the wearing of a religious symbol in the exercise of their duties and, ultimately, to find answers concerning their personal situation in a specific context.⁵¹

The responsibility for determining what behaviour best reflects the requirements inherent in this duty, and for adopting that behaviour, lies primarily with each judge, whose appointment is a sign of confidence in them personally.⁵² It is up to the judge to examine their conscience and decide whether they have the necessary impartiality and independence to hear or to continue to hear the case,⁵³ keeping in mind that impartiality constitutes the fundamental qualification of a judge and the core attribute of the judiciary.⁵⁴

The judge must consider that the primary purpose of ethics is to prevent any violation and maintain the public's confidence in judicial institutions.⁵⁵

The judge must be and must give the appearance of being an example of impartiality, independence and integrity.⁵⁶ Any conduct that, in public or in court, would jeopardize these values governing the judiciary is likely to be sanctioned.⁵⁷

**THE JUDGE MUST BE
AND MUST GIVE
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Conclusion

Based on the above considerations, the Conseil de la magistrature concludes that the current ethical standards provide a sufficient framework for the conduct expected of judges, including with respect to secularism requirements. Such a framework, rather than illustrating specifics and the types of conduct allowed,⁵⁸ must continue to provide overall guidance on the judge's conduct.

Practically speaking, the ethical duties of judges are implemented in two ways. First, it is up to the judge to assess whether they are "fit" to hear a case. If they doubt their ability to conduct a trial impartially, they have an ethical obligation to recuse themselves. The parties may also apply for recusal based on the existing process.

Moreover, the existence of the Conseil de la magistrature ensures that judges are accountable for their conduct. It provides the assurance that any complaint from a citizen will be examined by a body that is independent of the government and the judiciary itself.⁵⁹

In this context, there is no need to amend the *Judicial Code of Ethics* applicable to judges of the Court of Québec⁶⁰ and to presiding justices of the peace, nor the *Code of ethics for municipal judges of Québec* since the objectives underlying the requirements of secularism, namely neutrality and impartiality, already constitute ethical duties included in these codes of conduct.

NOTES

1. Section 5 of the [*Act respecting the laicity of the State*](#), RLRQ, c. L-0.3 (hereinafter "the Act").
2. Section 5 of the [*Judicial code of ethics*](#), CQLR, c. T-16, r. 1 and Section 5 of the [*Code of ethics for municipal judges of Québec*](#), CQLR, c. T-16, r. 2.
3. As evidenced by this quote from Simon Jolin-Barrette, then Minister of Immigration, Diversity and Inclusiveness, on June 4, 2019 (Jolin-Barrette was appointed Minister of Justice and Attorney General of Québec on June 22, 2020), as part of the [*detailed study of Bill 21 \(Act respecting the laicity of the State\)*](#), in the *Journal des débats de la Commission des institutions*, vol. 45, No. 44: "[...] Because of judicial independence, it is the Conseil de la magistrature that will be responsible for managing the duty of secularism and the expression of secularism through judicial institutions and their members in Québec, for provincially appointed judges. [...] it comes down to the three pillars [...]: the legislative branch, the executive branch and the judicial branch. For the sake of judicial independence, the Conseil de la magistrature will not be told how to make the rules, they will be the ones setting the rules."
4. From a secular State perspective, the purpose of this apparent duty of neutrality is to prevent any situation of discrimination or the appearance of discrimination against the users of these institutions and services, who are always free to express their personal preferences by wearing religious symbols.
5. For example, using legislation to put a ban on such symbols for judges would have risked hitting several obstacles, such as the separation of powers, which includes guarantees relating to the independence of judicial power. See BOSSET, Pierre, *Les signes religieux dans l'appareil d'État*, Département des sciences juridiques, Université du Québec à Montréal, February 1, 2019. See also Mr. Bosset's brief presented to the Committee on Institutions as part of considerations of Bill 21, pp. 15–16.
6. Sections 256, para. b) and 261 of the [*Courts of Justice Act*](#), CQLR, c. T-16. A *Judicial Code of Ethics* was adopted by the Conseil (CQLR, c. T-16, r. 1). A code of ethics also governs the conduct of part-time municipal judges (CQLR, c. T-16, r. 2).
7. S. 96, para. 1, subsection 3; s. 98, para. 2, subsection 3; and s. 169 of the *Courts of Justice Act*, supra note 6.
8. Section 262 of the *Courts of Justice Act*, supra note 6. The Chief Judge is in a unique position to assume this responsibility, as they are tasked with ensuring the proper functioning of the court in all respects: *Ruffo v. Conseil de la magistrature du Québec*, [1995] 4 SCR 267, para. 59.

9. *Re Ruffo*, [2005 QCCA 1197](#), para. 50, and OUIMET, André, "L'indépendance du juge comme devoir déontologique au Québec," *Les cahiers de la justice*, 2012, p. 89.
10. *Ruffo v. Conseil de la magistrature du Québec*, supra note 8, para. 110.
11. The penultimate "AS" set out in the *Act* establishes a link between secularism and the judges' duty of impartiality: "AS State laicity contributes to the fulfilment of the magistrature's duty of impartiality."
12. *R. v. S. (R.D.)*, [\[1997\] 3 SCR 484](#), para. 115 and 120.
13. *Ibid*, para. 91.
14. *Valente v. The Queen*, [\[1985\] 2 SCR 673](#), p. 685.
15. *Re Ruffo*, supra note 9, para. 53.
16. *R. v. S. (R.D.)*, supra note 12, para. 105.
17. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015 SCC 25](#), para. 22.
18. *R. v. S. (R.D.)*, supra note 12, para. 119. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, supra note 17, para. 33.
19. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, supra note 17, para. 34.
20. *Ibid*, para. 33, 36 and 59.
21. *R. v. S. (R.D.)*, supra note 12, para. 95.
22. *Re Ruffo*, supra note 9, para. 148.
23. *R. v. S. (R.D.)*, supra note 12, para. 118.
24. *Re Therrien*, [2001 SCC 35](#), para. 110.
25. *R. v. S. (R.D.)*, supra note 12, para. 120.
26. *Ibid*, para. 116.
27. *Re Therrien*, supra note 24, para. 109.
28. *Cojocaru v. British Columbia Women's Hospital and Health Centre*, [2013 SCC 30](#), para. 14 to 17.
29. *R. v. Teskey*, [\[2007\] 2 SCR 267](#), para. 19.
30. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, supra note 17, para. 20 and 37.
31. *R. v. S. (R.D.)*, supra note 12, para. 111. See also BOSSET, Pierre, [Réflexions d'un juriste sur l'idée d'interdire le port de signes religieux aux agents de l'État](#), Webzine *Vivre ensemble*, vol. 20, no. 70, 2013.
32. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, supra note 17, para. 37.
33. *R. v. S. (R.D.)*, supra note 12, para. 112.
34. *Ibid*, para. 115.
35. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, supra note 17, para. 61. According to the [Canadian Judicial Council's Ethical Principles for Judges](#), June 2021: "Neither the practice of religion nor membership in a religious organization is inconsistent with "Ethical Principles." (p. 37, from the chapter on equality). Judges are also urged to be cautious about serving in "leadership positions" in religious organizations (p. 46, chapter on impartiality). See also *Re Ruffo*, supra note 8, para. 60.
36. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, supra note 17, para. 61.
37. *R. v. S. (R.D.)*, supra note 12, para. 115.
38. *Ibid*, para. 136 and 141. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, supra note 17, para. 25 and 26.
39. BOSSET, Pierre, [Réflexions d'un juriste sur l'idée d'interdire le port de signes religieux aux agents de l'État](#), supra note 31.
40. *R. v. S. (R.D.)*, supra note 12, para. 109.
41. See also this passage from the [Canadian Judicial Council's Ethical Principles for Judges](#), taken from the chapter on impartiality, and from which we could draw an analogy with the wearing of religious symbols: "While judges may wish to signal support for causes or [certain] viewpoints through words or in the wearing or display of symbols of support, even if they seem innocuous, such communications may be interpreted as reflecting a lack of impartiality or the use of the position of the judge to make a political or other statement. "For these reasons, judges should avoid statements or visible symbols of support, particularly in the context of court proceedings." (p. 40).
42. See section of the *Judicial Code of Ethics* and the *Code of ethics for municipal judges of Québec*.
43. *Ruffo v. Conseil de la magistrature du Québec*, supra note 8, para. 107.
44. *Ibid*.

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45. "AS a stricter duty of restraint regarding religious matters should be established for persons exercising certain functions, resulting in their being prohibited from wearing religious symbols in the exercise of their functions;"
 46. *Re Therrien*, supra note 24, para. 108.
 47. *Ibid*, para. 109.
 48. *Ibid*, para. 111.
 49. *Ruffo v. Conseil de la magistrature du Québec*, supra note 8, para. 110 and 111.
 50. *Re Ruffo*, supra note 9, para. 44.
 51. See BOSSET, Pierre, supra note 4: "It is preferable in these matters to appeal to the judge's sense of ethics, leaving them to decide whether or not they should recuse themselves in a specific case."
 52. *Ruffo v. Conseil de la magistrature du Québec*, supra note 8, para. 106.
 53. *Re Ruffo*, supra note 9, para. 150.
 54. *Ibid*, para. 53 and 291.
 55. *Ruffo v. Conseil de la magistrature du Québec*, supra note 8, para. 109 and 110, and *Re Therrien*, supra note 24, para. 110.
 56. *Re Therrien*, supra note 24, para. 111.
 57. OUIMET, André, "*L'indépendance du juge comme devoir déontologique au Québec*," supra note 9, para. 89.
 58. *Ruffo v. Conseil de la magistrature du Québec*, supra note 8, para. 110.
 59. OUIMET, André, "*L'indépendance du juge comme devoir déontologique au Québec*," supra note 9, para. 87. See Chapter III of the *Courts of Justice Act*, supra, note 6, concerning the receipt, examination and processing of complaints by the Conseil.
 60. Including when they sit on the Human Rights Tribunal and the Professions Tribunal.