

**York University**  
**School of Public Policy and Administration**  
**AP/PPAS-POLS 4130 6.0 D Politics, Law and the Courts**  
**Fall /Winter 2020-2021**

**(REMOTE DELIVERY)**

Course Directors; Ana Kapralos (Fall Term) Danny O'Rourke-Dicarlo (Winter Term)

Class Hours: **Section E: Wednesdays 7-10 pm**

Office Hours and Location: By appointment

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***Course Description:***

This course is designed to explore and analyze the interplay of politics, law and the courts in Canada. In order to achieve this overriding objective, the focus will be on the relationship between law, judicial decision-making and political processes. The course analyses how the adjudicative power of the courts constrains the legislative and executive branches of the government. In that regard, there will be survey of actors and institutions that shape Canada's judicial process. Furthermore, greater attention will be paid to judicial decision making, the political impact of court decisions, and the role of lawyers and judges within the judicial process. To understand the alleged process of judicialization of politics and politicization of judiciary, there will be extensive discussion on certain political and social battles that have reached the courts.

***Format***

***Please note: this is a course that depends on remote teaching and learning. There will be no in-person interactions or activities on campus for the Fall session, and to be confirmed for the Winter session. You are required to login every Wednesday at 7:00 pm for lectures and discussions. All assignments will be submitted and graded via our Moodle page or by email. Participation and group presentations will be delivered remotely on ZOOM.***

This course will be run as an online seminar. In addition to introducing and guiding discussion of the weekly assigned topics, the instructor will serve as a resource person in clarifying issues. Students will be assigned specific readings and are required to make presentations. Students are expected to read all required readings for each class and are prepared to make comments on presentation and readings (see instructions on participation and presentations below). Students may be randomly assigned on Zoom for breakout discussions. In addition, students are to monitor media events that may be relevant to the weekly themes.

As this will be remote delivery for the Fall (and to be confirmed for the Winter), we will take breaks periodically for some stretching-out and breakout discussions. The class will include an introduction of the topic, group presentations, class discussions, and time at the end for any tutorials.

**\*\*\* Technical requirements for taking the course:** In addition to stable, higher-speed Internet connection, students, optimally, will have a computer with a microphone and/or webcam (or a smart device with these features.) These devices will allow students to directly interact with the Course Director during and after the formal lecture/discussion. If you do not have access to a microphone or webcam you will still be able to participate via a text screen on our Zoom platform. Your regular attendance and online interaction with your Course Director and classmates is essential in achieving learning outcomes.

Several platforms will be used in this course (e.g., Moodle and Zoom,) through which students will interact with the course material and the course director, as well as with one another.

**Students shall note the following:**

Zoom is hosted on servers in the U.S. This includes recordings done through Zoom.

If you have privacy concerns about your data, provide only your first name or a nickname when you join a session.

The system is configured in a way that all participants are automatically notified when a session is being recorded. In other words, a session cannot be recorded without you knowing about it.

**Technology requirements and FAQs for Moodle can be found here - <http://www.yorku.ca/moodle/students/faq/index.html>”**

Here are some useful links for student computing information, resources and help:

[Student Guide to Moodle](#)  
[Zoom@YorkU Best Practices](#)  
[Zoom@YorkU User Reference Guide](#)  
[Computing for Students Website](#)  
[Student Guide to eLearning at York University](#)

## ***Learning Outcomes***

At the end of the course, students will be able to:

- acquire a comprehensive understanding of the hierarchy of court system in Canada;
- acquire a substantial knowledge on the administration of justice in Canada;
- critically appraise the basic structure and processes of the judicial system, judicial nominations and judicial decision making;
- comprehend the interplay of judicial decisional making and political processes; and
- appreciate the limits of judicial review

## **Evaluation:**

<b>Fall Term:</b>		<b>Winter Term: TBC</b>
Class Presentation	20 %	Mid-Term take home
Weekly Reading Summary:	10%	Presentation: Weekly Readings Participation:
Mid Term Exam (TBC):	20 %	Take Home Final Exam

## **Required Textbooks:**

### **Fall Term:**

Lori Hausegger, Matthew Hennigar, Troy Riddell. 2015. Canadian Courts: Law, Politics, and Process. Second Edition. Toronto: Oxford University Press.

### **Winter Term:**

Roach, Kent. 2016. The Supreme Court on Trial: judicial activism or democratic dialogue. Toronto: Irwin Law.

## **Reading Schedule:**

### **Week 1: Introduction:**

#### **Politics, Law and the Courts: Policy Making and Judicial Process: September 9**

Hausegger, Chapter 1, An Introduction to Politics, Law, and the Judicial Process

Hausegger, Chapter 2, The Structure of Canadian Courts

#### **Additional Readings:**

James Kelly and Michael Murphy, "Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor" (2005) 35:2 Publius 217-243,

<http://www.jstor.org.ezproxy.library.yorku.ca/openurl?volume=35&date=2005&page=217&issn=00485950&issue=2&>.

Department of Justice, *Canada's Court System* (Ottawa: Department of Justice Canada, 2005), <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/pdf/courten.pdf>.

### **Week 2: Alternative Dispute Resolution: September 16**

Hausegger, Chapter 3, Judicial Process and Alternative Dispute Resolution

#### **Additional Readings:**

Carrie Menkel-Meadow, "From Legal Disputes to Conflict Resolution and Human

Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context” (2004) 54 J. Legal Educ. 7-29,

Mauro Capelletti, “Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement” (1993) 56 Mod. L. Rev. 282-296,

### **Week 3: Judicial Process and Participants: September 23**

Hausegger, Chapter 4, Judicial Decision-Making

#### Additional Readings:

Patrick J. Monahan, “Judicial Review and Democracy: A Theory of Judicial Review” (1987) 21:1 U.B.C. L. Rev. 87-164,

Vuk Radmilovic, “Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond” (2010) 43:4 C.J.P.S. 843-86

### **Week 4: Judicial Selection: September 30**

Hausegger, *Canadian Courts*, Chapter 5, Judicial Selection

#### Additional Readings:

Irwin Cotler, “The Supreme Court Appointment Process: Chronology, Context, and Reform” (2008) 58 U. N. B. Law J. 131-146,

Carissima Mathen, “Choices and Controversy: Judicial Appointments in Canada” (2008) 58 U. N. B. Law J. 52-72,

### **Week 5: Accountability and Judicial Independence: October 7**

Hausegger, Chapter 6, Judicial Independence and Accountability

#### Additional Readings:

The Honourable Mr. Justice Frank Iacobucci, “The Supreme Court of Canada: Its History, Powers and Responsibilities” (2002) 4 J. Appellate Practice & Process 27-40,

Peter McCormick, “New Questions about an Old Concept: The Supreme Court of Canada’s Judicial Independence Decisions” (2004) 37:4 Can. J. Pol. Sci. 839-862,

### **Week 6: OCTOBER 12-16: READING WEEK**

### **Week 7: Courts, Pressure Groups and Intervenors: October 21**

Hausegger, Chapter 7, Actors in the Process: Interest Groups

#### Additional Readings:

Eugene Meehan, “Intervening in the Supreme Court of Canada” (1994) 16:2 Advoc. Q. 137-155

Ian Brodie, "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program" (2001) 34:2 Can. J. Pol. Sci. 357-376, <http://www.jstor.org.ezproxy.library.yorku.ca/stable/3232699>.

## **Week 8: Government, Courts and Reference Questions: October 29**

Hausegger, Chapter 8, Governments in Court

### Additional Readings:

Patrick J. Monahan, *Doing the Rules: An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference* (Ottawa: C.D. Howe Institute, February 2000),

Matthew Hennigar, "Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases? A Strategic Explanation" (2007) 41:1 Law & Soc. Rev. 225-250,

## **Week 9: Criminal Justice; Policy and Procedures: November 4**

Hausegger, Chapter 9, Criminal Justice: Policy and Process

### Additional Readings:

Anthony Doob and Jane Sprott, "Youth Justice in Canada" (2004) 31 Crime & Just. 185-242, <http://www.jstor.org.ezproxy.library.yorku.ca/stable/3488347>.

Scot Wortley and Akwasi Owusu-Bempah, "Unequal Before the Law: Immigrant and Racial Minority Perceptions of the Canadian Criminal Justice System" (2009) 10:4 J. Internat. Migration & Integration 447-473, <http://www.springerlink.com.ezproxy.library.yorku.ca/content/03676811221r238m/>.

## **Week 10: Civil Justice: Procedures and Access: November 11**

Hausegger, Chapter 10, Civil Justice: Private Disputes, Public Consequences

### Additional Readings:

Ruth Bader Ginsburg. *Access to Justice: The Social Responsibility of Lawyers*. 2001, v.7:1 Washington University Journal of Law and Policy

Marcus Manuel and Clare Manuel. *Achieving equal access to justice for all by 2030: Lessons from Global Funds*. OECD, 2018, Working paper 537

## **Week 11: Role of Law Reform Commissions: November 18**

Gavin Murphy, *Law Reform Agencies* (Ottawa: Government of Canada, International Cooperation Group, 2003), "Part 2: The Establishment of a Law Reform Agency," <http://www.justice.gc.ca/eng/abt-apd/icg-gci/lr-rd/lr-rd.pdf>, 27-61.

### Additional Readings:

W. H. Hurlburt, "Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to 'Recommissioning Law Reform' by Professor R.A. MacDonald" (1996-1997) 35 Alta. L. Rev. 880-902

Roderick MacDonald, "Recommissioning Law Reform" (1996-1997) 35 Alta. L. Rev. 831-879

## **Week 12: mid-term exam: November 25**

**Mid-term Exam Fall Term (Content for the mid-term will be drawn from a) the course text b) additional readings c) presentations)**

### **Class Participation (10%)**

Given that this course will be run on a seminar format, it is absolutely imperative that students complete all required readings, attend each and every remote class, and participate through regular and meaningful contributions to class discussions. With this in mind, regular attendance will be taken and **10%** of your grade will be based on your attendance record over the course of the term.

In order to be marked as present for a class, students **must**: (1) sign the online attendance sheet; **and** (2) submit a weekly summary, a one-page (12-point font, 1" margins, double spaced) summary of the main argument(s) and 3 key concepts from **one of the additional readings**. No cover page. These weekly summaries will be submitted electronically via Moodle each week before each class and will be graded as Pass/Fail. If you demonstrate thoughtful engagement with the readings, you will pass. In the case of absences due to medical conditions or illness, it is your responsibility to notify the instructor in advance, to provide appropriate documentation, and to supply weekly summaries for all missed seminars upon your return to class. Regular attendance is necessary *but not sufficient* to constitute class participation.

Beyond attendance, your grade will also be based on your participation. This includes regular, meaningful and collegial contributions to class discussions, the ability to demonstrate a strong grasp of the required readings, course concepts, ideas, and themes. It is expected that you will complete readings before class, **prepare weekly seminar discussion questions** and come to class prepared to engage in the seminar discussions.

### **Seminar Facilitation/Presentation (20%)**

This is an advanced seminar and in groups of two (or three, depending on class size), each student will be responsible for leading one seminar on **two** of the weekly **additional readings**. Groups will be randomly assigned and confirmed in the first class.

The objective is to encourage critical and analytical engagement with the readings, to make connections between the readings and other relevant issues and to develop your seminar facilitation and communication skills.

This is NOT a traditional presentation. Your job is to *facilitate* an extended seminar discussion about the readings. The key to leading a successful seminar is to come up with interesting, creative and original ways to encourage, engage and guide your fellow students in 'unpacking' and discussing the readings. We can talk about how to do this virtually. YOU ARE NOT REQUIRED TO COVER ALL ASPECTS OF THE

ADDITIONAL READINGS, ONLY THE MOST SALIENT/SIGNIFICANT ARGUMENTS AND/OR THEMES.

➤ **Internal Analyses**

To read an article critically means that you are not simply reading it to glean facts about a topic but rather you are reading it with a view to examining the way *the author has understood, argued and presented the topic*. Critical analysis does not simply mean 'criticism' (i.e. pointing out something that is negative or lacking in the reading). It involves unpacking and evaluating: the article's central questions/arguments; the conceptual/theoretical tools that the author uses to make sense of the topic of the article; its socio-political implications; and its overall strengths and weaknesses.

➤ **TWO Discussion Questions Posted on Moodle**

Seminar leaders will post two (2) questions to the "Discussion Board" area on the course Moodle page *one week* ahead of their seminar to help the class prepare for the seminar discussion of the readings. Discussion questions should aim to encourage **critical and analytical thinking** about the readings.

Discussion questions will not work if they simply require a yes or no answer or the simple retrieval of a fact from a reading. Instead questions can focus on, among other aspects, the nature and quality of the empirical evidence in the reading, the elements and consistency of the argument, methodological issues raised by the reading, theoretical issues raised by the reading, key concepts used in the reading, the ways in which the reading sheds light on course concepts, comparisons with other course readings. The two advance questions that you come up with are intended as *a starting point* to guide the students' thinking as they read the articles to help prepare them for the seminar that you have planned.

➤ **Creative and Interesting Facilitation Strategies**

In addition to the two questions posted on moodle one week in advance of the seminar date, seminar leaders need to think carefully and creatively about how to facilitate and guide class discussion in these directions. This may include drawing from your advance questions, posing follow-up questions, individual or group exercises, and making use of other creative and interesting resources such as relevant media stories, law or policy documents, graphics, audio and visual cues and exercises, photography etc. Groups can discuss with me beforehand to plan these in a remote manner.

➤ **Seminar Moderation**

In addition to facilitation, seminar leaders are responsible for moderating class discussion. This may entail: calling on participants to give their thoughts about a discussion question or issue; planning and administering individual or group exercises or using other creative pedagogical tools to stimulate critical thinking and class discussion; keeping an eye on the time (**35-40 minutes max**,) and bringing discussion of a particular question or issue to a close in order to move on to another question or issue; ensuring that the discussion stays focused, relevant and on track.

**Other Points to Note about the Seminar Facilitation:**

- **Distribution of one page plan.** On the day of your seminar, before class begins, you will provide the class with a one-page outline/plan of your seminar posted on Moodle under each weekly theme, in the Group Class Presentation box.

- **Begin with *brief* introduction to the readings.** You are expected to begin with a brief introduction to the readings that identifies the main arguments and key points ***in your own words***. Try to make this as engaging as possible by not simply reading from a prepared text.
- **Prepare a Power Point Presentation** that illustrates the main-points of the articles under review and draws connections with broader course concepts and themes. You will provide this to classmates before class, via Moodle under each week's theme, in the Group Class Presentation box.
- **This is a joint assignment.** The seminar must be approached as a cooperative, team effort at every stage:
  - Students must work *together* to plan and organize all parts of the seminar.
  - *Both* seminar leaders need to read and think carefully about *both* assigned readings.
  - Both seminar leaders should work together to unpack the readings and identify what points of analysis will be important to address in the seminar.
  - Both seminar leaders need to collaborate in order to design and plan creative, interesting and original strategies to guide the seminar discussion in desired directions.
  - Both seminar leaders must demonstrate that they have read and thought carefully about *both* of the required readings and that you have both been actively engaged in the planning and preparation of all parts of the seminar.
- **Seminar evaluation.** Seminars will be evaluated according to:
  - The quality of the advance and follow-up discussion questions (e.g. Were they provided in time? Were they thoughtfully constructed to engage students in critical thinking about the readings; Did they effectively provoke critical discussion; Were they relevant to the course?);
  - The quality of the oral introduction/power-points to the readings (e.g. Was it presented in an engaging manner? Did it accurately capture the main arguments of the article? Was it logical, well organized and concise? Was it presented without directly reading from text? );
  - The quality of the critical analysis of the articles; identification and engagement with key arguments, concepts, findings, conclusions, methods, evidence (internal); consideration of connections between the articles and links made with course themes
  - The creativity, planning and effectiveness of the seminar facilitation strategies and moderation;
  - The preparation, organization and format of the seminar. This includes the demonstrated degree of collaboration between the seminar leaders in the preparation and planning of the seminar, evidence that both seminar leaders were familiar with both readings and had thought together about how they relate/compare, the planning and timing of the different parts of the seminar, coming up with innovative strategies and exercises to stimulate discussion and critical thinking.



**Checklist:**

- ✓ (at least) **4 weeks prior:** Start reading and preparing with your partner, if possible
- ✓ **1 week prior:** Post the finalized questions on the website, if possible
- ✓ **Day of:** Brief summary of seminar plan and Group Class Presentation (posted on Moodle before class)
- ✓ **Day of:** Amazing facilitation with creative and engaging pedagogical tools
- ✓ **Day of:** Submit Power Point Presentation on Moodle under Assignments box.

**Second Term (O'Rourke-Dicarlio): TBC**

**NOTE: Topics and readings will be amended prior to the beginning of the winter term**

**Week 1 Introduction Jan 6****Jan 13 Week 2: Philosophy, Law and Politics (Presentation Dates Assigned)**

Miro Cerar. 2009. The Relationship Between Law and Politics. Annual Survey of International & Comparative Law: Vol. 15: Iss. 1, Article 3.

<https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1126&context=annlsurvey>

**Jan 20 Week 3: Judicial Review and Judicial Activism**

Roach, ch 1, ch2

Smith Jennifer. The Origins of Judicial Review in Canada. Canadian Journal of Political Science / Revue canadienne de science politique, Vol.16, No. 1 (Mar., 1983), pp. 115-134

**Jan 27 Week 4: Judicial Activism Before and After the Charter (Presentations begin)**

Roach, ch 3, ch4, ch 5

Sanjeev, Anand. The Truth About Canadian Judicial Activism. Constitutional Forum, Volume 15, Number 2, 2006

**Feb 3 Week 5: Dimensions of Judicial Activism**

Roach, ch 6, ch7

Kmiec Keenan. 2004. The Origins and Current Meanings of Judicial Activism. California Law Review, 92, 1441-1477

**Feb 10 Week 6: Limits of Public Law Adjudication (Mid Term Circulated)**

Roach, ch 8, ch9

Peter Russell. (1994). Canadian Constraints on Judicialization from Without. International Political Science Review, 15:2, pp 165-175.

**Feb 24 Week 7: Mid-Term Discussion****March 2 Week 8: Critiques of Judicial Review (Mid Term Due In Class)**

Hunt, Stacie, "The Judicialization of Politics in Canada and the United States" (2013). Honors Projects. 39. [https://scholarworks.bgsu.edu/honor\\_sprojects/3](https://scholarworks.bgsu.edu/honor_sprojects/3)

### **March 9 Week 9: Dialogue Between Courts and Legislatures (two presentations)**

Roach, ch 10

Peter Hogg and Allison Russell. "The Charter Dialogue between Courts and the Legislatures." *Osgood Hall Law Journal*. 35:1 (1997).

Andrew Petter. Taking Dialogue Theory Much Too Seriously 2007 .pp.187-199  
<https://pdfs.semanticscholar.org/09e6/27bbc156865f3a0a348bd41ce75727a905fd.pdf>

### **March 16 Week 10: Beyond Judicial Activism**

Roach, ch 11, ch 12

Richard A. Epstein, "Beyond Judicial Activism and Restraint," 1 *Georgetown Journal of Law and Public Policy* 85 (2002)

### **March 25 Week 11: Democratic Dialogue**

Roach, Ch 13, ch 14

Yasmin Dawood, "Democracy and Dissent: Reconsidering the Judicial Review of the Political Sphere" (2013) 63 *Supreme Court Law Review* 59-87.

### **March 30 Week 12: Judicial activism and democratic dialogue/ Democratic dialogue in theory and Practice: A Response to Critics. (Two presentations)**

Roach, ch 15, 16, 17

Monahan, Patrick J. "Judicial Review and Democracy: A Theory of Judicial Review." *UBC Law Review* 21.1 (1987): 87-164

Peter Hogg [Charter Dialogue Revisited: Or "Much Ado About Metaphors"](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1254&context=ohlj) 2007  
<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1254&context=ohlj>

### **Accommodation for Disabilities:**

Students with disabilities who require adaptations or services must discuss their needs with the instructor. Accommodation for disability must be arranged in conjunction with the Office for Persons with Disability.

### **Plagiarism:**

Plagiarism is generally considered to be the most serious academic misconduct that a student can commit. Whether intentionally or unintentionally, instances of plagiarism will have serious academic consequences. In order to avoid slipping into the realm of plagiarism, students are advised to familiarize themselves with York University's definition of academic dishonesty.