

York University
School of Public Policy and Administration
AP/PPAS-POLS 4130 6.0 E Politics, Law and the Courts
Fall /Winter 2021-2022
Location: In-class - TBC

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

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

Office Hours and Location: By appointment

Email: (Fall) ourke@yorku.ca; (Winter) akapralo@yorku.ca

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 constraints 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

This course will be run as a 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). In addition, students are to monitor media events that may be relevant to the weekly themes.

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

Fall Term:		Winter Term:	
Participation:	5%		
Mid-Term take home:	15%	Weekly Reading Summaries (10 submissions):	10%
Presentation:	15%	Class Presentation:	20 %
Take Home Final Exam:	15%	Mid Term Exam–Take Home:	20 %

Required Textbooks

Fall Term:

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

Winter Term:

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

(e-book will be posted on e-class for one free week for your reference and available for purchase after the free access)

Assignments

Class Participation and Weekly Reading Summaries (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 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, class participation, and submission of weekly reading summaries over the course of the term.

In order to be marked as present for a class, students **must**: (1) sign the attendance sheet; **and** (2) submit a weekly reading summary, a one-page (12-point font, 1" margins, single spaced) from **one of the additional readings**. No cover page. These weekly summaries will be submitted electronically via e-class 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. **A weekly summary is not required the week you present.**

Beyond attendance, your grade will also be based on your participation. This includes regular, meaningful and collegial contributions to class and group 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 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 week's class.

The objective is to encourage critical and analytical engagement with the readings, to make connections between the readings and other relevant and current 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. **YOU ARE NOT REQUIRED TO COVER ALL ASPECTS OF THE ADDITIONAL READINGS, ONLY THE MOST SALIENT/SIGNIFICANT ARGUMENTS AND/OR THEMES.**

➤ Critical Analysis

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 E-class

Seminar leaders will post two (2) questions to the "Discussion Board" area on the E-class 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 E-class 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, games, graphics, audio and visual cues and exercises, photography etc.

➤ **Seminar Moderation**

In addition to facilitation, seminar leaders are responsible for moderating class discussion. This may include: 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 (**30-45 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. This is where the development of an agenda will keep your group to your time.

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 E-class 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, posted on E-class, under the 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.
 - Seminar leaders need to read and think carefully about assigned readings.
 - Seminar leaders should work together to unpack the readings and identify what points of analysis will be important to address in the seminar.
 - Seminar leaders need to collaborate in order to design and plan creative, interesting and original strategies to guide the seminar discussion in desired directions.
 - 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, and relates to current events in the media.
 - 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 two questions on E-class, if possible
- ✓ **Day of:**
 - Before class, post your brief summary of seminar plan and group class presentation under weekly topic box on E-class.
 - During class, lead amazing facilitation with creative and engaging pedagogical tools
 - After class, submit presentation on E-class under Assignments box.

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.

Weekly Schedule – Fall 2021

Week 1: Introduction: Sept 13

Week 2: Philosophy, Law and Politics (Presentation Dates Assigned): Sept 20

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>

Week 3: Judicial Review and Judicial Activism: Sept 27

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

Week 4: Judicial Activism Before and After the Charter (Presentations begin): Oct 4

Roach, ch 3, ch4, ch 5

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

Week 5: Reading Week: Oct 11-15

Week 6: Dimensions of Judicial Activism: Oct 18

Roach, ch 6, ch7

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

Week 7: Limits of Public Law Adjudication (Mid Term Circulated): Oct 25

Roach, ch 8, ch9

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

Week 8: Mid-Term Discussion: Nov 1

Week 9: Critiques of Judicial Review (Mid Term Due In Class): Nov 8

Hunt, Stacie, "The Judicialization of Politics in Canada and the United States" (2013). Honors Projects. 39. <https://scholarworks.bgsu.edu/honorsprojects/39>

Week 10: Dialogue Between Courts and Legislatures (two presentations): Nov 15

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>

Week 11: Beyond Judicial Activism: Nov 22

Roach, ch 11, ch 12

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

Week 12: Democratic Dialogue: Nov 29

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.

Week 13: Judicial activism and democratic dialogue/ Democratic dialogue in theory and Practice: A Response to Critics. (Two presentations): Dec 6

Roach, ch 15,

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>

Weekly Schedule – Winter 2022

Week 1: Introduction and Overview – Jan 10

Group Presentation - Assignments

Week 2: Courts, Law, Policy Making and Judicial Process: Jan 17

Hausegger, Chapter 1, An Introduction to Politics, Law, and the Judicial Process
Hausegger, Chapter 2, The Structure of Canadian Courts

Additional Readings:

Canada Department of Justice. Research and Statistics Division. (2017) Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System, <https://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf>

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&spage=217&issn=00485950&issue=2&>.

Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira. (2011) Overview of Law and Politics the Study of Law and Politics. The Oxford Handbook of Political Science. Edited by Robert E. Goodin,
<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-012?print=pdf>

Supplementary:

Department of Justice, *Canada's Court System* (Ottawa: Department of Justice Canada, (2015), <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/pdf/courten.pdf>

Tribunals Ontario. Business Plan 20-21.
https://tribunalsontario.ca/documents/TO/TO_2020.21%20-%202022.23_Business_Plan_EN.html

Ontario Land Tribunal. (OLT Created Jan 2019). Annual Report 2019-20.
https://olt.gov.on.ca/wp-content/uploads/2020/09/Tribunals_Ontario_2019-2020_Annual_Report_EN.pdf

Week 3: The Current Landscape of Justice – Impacts and Responses to COVID19 Pandemic – Jan 24

Richard Haigh and Bruce Preston. "The Court System in a Time of Crisis: COVID-19 and Issues in Court Administration." *Osgoode Hall Law Journal* 57.3 (2021) : 869-904.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss3/11>

Organization for Security and Co-operation in Europe (OSCE). Office for Democratic Institutions and Human Rights (ODIHR). October 2020. The Functioning of Courts in the Covid-19 Pandemic – Primer. <https://www.osce.org/files/f/documents/5/5/469170.pdf>

Week 4: Judicial Process and Alternative Dispute Resolution: Jan 31

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, <https://www-jstor-org.ezproxy.library.yorku.ca/stable/pdf/42893832.pdf?refreqid=excelsior%3Ae72ecfed7ef1b4769a12f723a25abd58>

Mauro Capelletti, "Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement" (1993) 56 Mod. L. Rev. 282-296, <https://www-jstor-org.ezproxy.library.yorku.ca/stable/pdf/1096668.pdf?refreqid=excelsior%3A1af167560d8ec4a81847a83305b7ab66>

Week 5: Judicial Decision-Making and Influences: Feb 7

Hausegger, Chapter 4, Judicial Decision-Making

Additional Readings:

Lee Epstein, Some Thoughts on the Study of Judicial Behavior, 57 Wm. & Mary L. Rev. 2017 (2016), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3656&context=wmlr>

Vuk Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond" (2010) 43:4 Canadian Journal of Political Science. 843-69. <https://www-jstor-org.ezproxy.library.yorku.ca/stable/pdf/40983557.pdf?refreqid=excelsior%3Aabb0b74ba7679a477b5d680d45135e064>

Week 6: Judicial Selection and Diversity: Feb 14

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, https://go-gale-com.ezproxy.library.yorku.ca/ps/i.do?p=AONE&u=yorku_main&id=GALE%7CA183315159&v=2.1&it=r

Samreen Beg, and Lorne Sossin. "Diversity, Transparency and Inclusion in Canada's Judiciary." *Debating Judicial Appointments in an Age of Diversity*. 1st ed. Routledge, 2018. Chapter 7- 118–141. <https://www.taylorfrancis-com.ezproxy.library.yorku.ca/books/edit/10.4324/9781315400068/debating-judicial-appointments-age-diversity-graham-gee-erika-rackley>

Supplementary Readings:

Ontario Justice Appointments Advisory Committee (JAAC). Ministry of the Attorney General. <https://www.ontariocourts.ca/ocj/jaac/>

Ontario Justice of the Peace Appointments Advisory Committee (JPAAC). Ministry of the Attorney General. <https://www.ontariocourts.ca/ocj/jpaac/>

Supreme Court of Canada Judicial Appointments. <https://www.fja-cmf.gc.ca/scc-csc/2021/index-eng.html>

Week 7: Feb 21-25: READING WEEK

Week 8: Judicial Independence and Accountability: Feb 28

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, https://go-gale-com.ezproxy.library.yorku.ca/ps/i.do?p=AONE&u=yorku_main&id=GALE%7CA90301876&v=2.1&it=r

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, <https://www-proquest-com.ezproxy.library.yorku.ca/docview/204609715/fulltextPDF/1110F045C32C4337PQ/1?accountid=15182>

Week 9: Courts, Pressure Groups and Intervenors/Government, Courts and Reference Questions: March 7

Hausegger, Chapter 7, Actors in the Process: Interest Groups
Hausegger, Chapter 8, Governments in Court

Additional Readings:

Benjamin R. D. Alarie; Andrew J. Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance," *Osgoode Hall Law Journal* 48, no. 3 & 4 (2010): 381-410, <https://heinonline-org.ezproxy.library.yorku.ca/HOL/Page?handle=hein.journals/ohlj48&id=387&collection=journals&index=>

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>.

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, <https://onlinelibrary-wiley-com.ezproxy.library.yorku.ca/doi/pdfdirect/10.1111/j.1540-5893.2007.00296.x>

Week 10: Criminal Justice: March 14

Hausegger, Chapter 9, Criminal Justice: Policy and Process

Additional Readings:

Palma Paciocco. "Trial Delay Caused by Discrete Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19." Osgoode Hall Law Journal 57.3 (2021) : 835-867 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3607&context=ohlj>

G Maglione. Restorative Justice Policy in Context: A Legal-Archaeological Analysis. Int J Semiot Law (2020). <https://link.springer.com/content/pdf/10.1007/s11196-020-09747-0.pdf>

Supplementary:

Brian J. Ostrom. (2020) National Centre for State Courts. Delivering Timely Justice in Criminal Cases: A National Picture. <https://ncsc.contentdm.oclc.org/digital/collection/criminal/id/321>

Week 11: Civil Justice: Procedures and Access: March 21

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

Additional Readings:

Suzanne E. Chiodo. "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" Osgoode Hall Law Journal 57.3 (2021) : 801-833, <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3606&context=ohlj>

Trevor C. W. Farrow. Civil Justice, Privatization, and Democracy. University of Toronto [Ontario] Press, 2014, ch 3 (privatization of civil courts) and ch 6 (concerns with privatization of civil courts). Ebook. <https://books-scholarsportal-info.ezproxy.library.yorku.ca/en/read?id=/ebooks/ebooks3/utpress/2014-04-24/1/9781442663640#page=236>

Week 12: Innovations in Justice: March 28

European Commission for the Efficiency of Justice (CEPEJ). (2020) Possible introduction of a mechanism for certifying artificial intelligence tools and services in the sphere of justice and the judiciary: Feasibility Study <https://rm.coe.int/feasability-study-en-cepej-2020-15/1680a0adf4>

Siddharth Peter de Souza, and Maximilian Spohr. 2020. Technology, Innovation and Access to Justice. Future Law Services. Chapter 5 (The Future of Law: Technology, Innovation and Access to Justice in Legal Services Around the World). Edinburgh: Edinburgh University Press.
<http://search.ebscohost.com.ezproxy.library.yorku.ca/login.aspx?direct=true&db=nlebk&AN=2709240&site=ehost-live>

Wallace, A., & Laster, K. (2021). Courts in Victoria, Australia, During COVID: Will Digital Innovation Stick?. International Journal for Court Administration, 12(2), 9,
<https://www.iacajournal.org/articles/10.36745/ijca.389/#>

M. P. Castro and T.A. Guimaraes. (2020), "Dimensions that influence the innovation process in justice organizations", Innovation & Management Review, Vol. 17 No. 2, pp. 215-231. <https://www.emerald.com/insight/content/doi/10.1108/INMR-10-2018-0075/full/html#abstract>

Supplementary Readings:

OECD/Eurostat (2018), Oslo Manual 2018: Guidelines for Collecting, Reporting and Using Data on Innovation, 4th Edition, The Measurement of Scientific, Technological and Innovation Activities, OECD Publishing, Paris/Eurostat, Luxembourg.
<https://www.oecd-ilibrary.org/docserver/9789264304604-en.pdf?expires=1629237245&id=id&accname=guest&checksum=2EC61CEC7E5AEBA779B340205CC28A19>

Week 13: Recap and Mid Term Assigned: April 4

Mid-term Exam Fall Term (Content for the mid-term will be drawn from a) the course text b) additional readings c) presentations. DUE: April 29 (TBC)

