

OUTLINE FOR PPAS 4130
Section C
Fall/Winter 2022-2023

York University
School of Public Policy and Administration
Faculty of Liberal Arts and Professional Studies
Politics, Law and the Courts
Prof: Dr. Radha Persaud

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SEMINAR: YK VH 2000 Thursdays: 2:30 to 5:30 p.m.

OFFICE HOURS: Mondays: 5:00-5:50 pm
Or by appointment

LAND ACKNOWLEDGEMENT

York University recognizes that many Indigenous Nations have longstanding relationships with the territories upon which York University campuses are located that precede the establishment of York University. York University acknowledges its presence on the traditional territory of many Indigenous Nations. The area known as Tkaronto has been care taken by the Anishinabek Nation, the Haudenosaunee Confederacy, and the Huron-Wendat. It is now home to many First Nation, Inuit, and Métis communities. We acknowledge the current treaty holders, the Mississaugas of the Credit First Nation. This territory is subject of the Dish with One Spoon Wampum Belt Covenant, an agreement to peaceably share and care for the Great Lakes region (LA&PS Land Acknowledgement). [See York University's *Land Acknowledgement*.]

COURSE DESCRIPTION

This course examines the relationship between politics, law and the courts in Canada. Questions we will explore include:

- *The Supreme Court's role in Canadian political practice and in political outcomes?
This exploration will focus on two themes. First, the impact the Charter of Rights and Freedoms has had in Canadian politics and the impact of Canadian political debate and political values in the development of Canadian Charter of Rights jurisprudence. Second, the advisory role of the Supreme Court in intergovernmental relations and conflict resolution.
- *The implications for Canadian democracy of the Supreme Court's "political role".
- *The limits of constitutional litigation and adjudication on the political/social life of Canada.

COURSE OBJECTIVES

- Objects of this seminar include giving students a solid grounding in the history of constitutional adjudication in Canada and a good understanding of the institutional structures and relationships that enable and determine the role of courts in shaping the operation of government's political branches.
- A further object is to critically examine the judicial function from the perspectives of (a) whether judicial decision-making in the general area of political and public law is based on intellectual

process that is distinct from the calculations of ordinary politics; (b) whether methods of court adjudication contribute to the development of good government in Canada.

LEARNING OBJECTIVES/OUTCOMES

The specific learning outcomes of the course –that is to say, to the extent possible in a course seminar-- are that students will be able to:

- *identify and analyze the doctrines, principles, relationships and dynamics at work in meeting the challenges in producing government under the rule of law
- *use a comparative approach in illuminating the Canadian experience (Canada and U.S.)
- *apply theory/doctrines/concepts to the judicial role
- *discuss and analyze landmark constitutional cases and their policy effects/impact on the other branches of government and society
- *critically discuss and analyze the virtues and limitations of the judicial role in political law
- *understand the judicial method as the third branch of government in the democratic polity
- *understand the degree of elasticity in the judicial method and the role of values and moral presuppositions in the formation of constitutional limits
- *understand the public policy role of the Supreme Court
- *understand the extent to which the Constitution is a document dedicated to developing a good state

REQUIREMENTS FOR EVALUATION:

Mid-Term Test (Nov 17, 2022)	30%
Presentation	10%
Response to presentation	05%
Participation	10%
Research Paper (12 pages typed and double-spaced) ** (due date March 23, 2023)	45%

[**Additional information/specific instructions regarding the presentation, response and research paper requirements will be provided in our Zoom class meetings.]

ONLINE -- ZOOM -- MOODLE

This course requires the use of online proctoring for examinations. The instructor may use an online proctoring service to deliver the exam(s), which would be administered through the Learning Management System (e.g. Moodle, Canvas, etc.). Students are required to have access to minimum technology requirements to complete examinations. If an online proctoring service is used, students will need to become familiar with it at least five days before exam(s). For technology requirements, Frequently Asked Questions (FAQs) and details about the online proctoring service visit – [*link to be added*]. Students are required to share any IT accommodation needs with the instructor as soon as they are able.

Several platforms will be used in this course (e.g., Moodle, Canvas, **Zoom**, etc.) through which students will interact with the course materials, the course director / TA, as well as with one another. Please review the syllabus to determine how the class meets (in whole or in part), and how office hours and presentations will be conducted.

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>

Frequently Asked Questions | Moodle@York | York University

To view your grades, follow the steps below: Log in to Moodle@York, and click on the required course title that appears.; Click on Grades in 'Settings' block. The User report will be displayed. You may click on Overview report to view grades of all the courses you are enrolled in. To view grades for a specific assignment, follow the steps below: www.yorku.ca

REQUIRED TEXTS (York University Bookstore)

- (1) Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, Revised Edition, Toronto: Irwin law, 2016. (Paperback ISBN: 978 155221 438 1)
- (2) Gregory Tardi, *The Theory and Practice of Political Law*, Second Edition, Toronto: Carswell, 2016. (Paperback ISBN: 978-0-7798-7325-8)

CLASS SESSIONS—READINGS—PRESENTATIONS

- Sept 8 --Introduction & Presentation Selection
- Sept 15 --Lecture/class discussion on politics, law and the courts--
the judicial power in Canada's political, legal and constitutional cultures
- The Supreme Court of Canada's policy role and hence relevance
to political science studies—institutionalism or neo-institutionalism

CHARTER'S ROLE AND IMPACT JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE

PRESENTATIONS AND RESPONSES

- Sept 22 --Roach, Chp.1, "The Supreme Court on Trial"
- Roach, Chp. 2, "The Endless American Debate"—over the legitimacy of
Judicial Review in the democratic polity
- Sept 39 --Roach, Chp. 3, "Judicial Activism before the Charter"

--Roach, Chp. 4, "The Charter's Influential Response to Judicial Activism"

Oct 6 --Roach, Chp. 5, "An American Debate comes to Canada"

--Roach, Chp. 6, "Four Dimensions of Judicial Activism"

--See also Eugene Rostow, "The Democratic Character of Judicial Review", *Harvard Law Review*, Vol. 66, No. 2, December (1952): 193-221.

Oct 20 --Roach, Chp. 7, "The Constrained Creativity of Judicial Law Making"

--Roach, Chp. 8, "The Limits of Public Law Adjudication"

Oct 27 --Roach, Chp. 9, "Judicial Acceptance of Limits on Rights"

--Roach, Chp. 10, "Dialogue between Courts and Legislatures"

--See also William R Lederman, "Democratic Parliaments, Independent Courts and the Canadian Charter of Rights and Freedoms", *Queen's Law Journal*, Vol. 11 (1986).

Nov 3 --Roach, Chp. 11, "The Myths of Judicial Activism"

--Roach, Chp. 12, "The Myths of Right Answers"

--See also John Whyte, "The Charter at 30: A Reflection", *Review of Constitutional Studies*,^[1]_[SEP] Volume 17, no. 1 (2012)

Nov 10 --Roach, Chp. 13, "Democratic Dialogue in Theory"

--Roach, Chp. 14, "Democratic Dialogue in Practice"

--Roach, Chp. 15, "Judicial Activism and Democratic Dialogue"

Nov 17 **Mid-Term Test**

--Roach, Chp. 16, "Dialogue in Practice: 2001-2016"

--Roach, Chp. 17, "Dialogue in Theory: A Response to Critics"

--Paul Brest "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship", *The Yale Law Journal*, Vol. 90 (1981): 1063-1109.

Nov 24 --Christopher Manfredi and James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell", *Osgoode Hall Law Journal*, Fall 1999, Vol. 37, No. 3.

--Peter Hogg and Allison A. Thornton, "Reply to Six Degrees of Dialogue", *Osgoode Hall Law Journal*, Fall 1999, Vol. 37, No. 3.

--**Video**, The Right Hon. Beverley McLachlin, Chief Justice of Canada, "Respecting Democratic Roles" (video)

THE SUPREME COURT AND FEDERALISM

Dec 1 --Gregory Tardi, “Legality and Power: The Fundamental and Timeless Debate in Governing”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 1

--Gregory Tardi, “Historical Background: The Evolution of Scholarship”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 2

--Gregory Tardi, “Historical Background: The Milestone Instruments”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016),

Jan 12 --***Reference Re Secession of Quebec (1998)*** (in its entirety)

--Gregory Tardi, “Modern Background: Recent and Current Scholarship”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 3

Jan 19 --Gregory Tardi, “The Comprehensive Theory of Political Law”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 7

--Gregory Tardi, “The Practice of Political Law in the Legislative Branch”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 8

Jan 26 --***The Patriation Reference (1981)***—in its entirety

--Adam Dodek, “Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference”, *Supreme Court Law Review* (2011), 54 S.C.L.R. (2d)

--Gregory Tardi, “The Accountability to Law of Heads of State and Government: Theory”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 11

Feb 2 --Peter Russell, “The Supreme Court Decision: Bold Statecraft Based on Questionable Jurisprudence”, *The Court And The Constitution* (Queen’s University: Institute of Intergovernmental Relations, 1982)

--Gregory Tardi, “The Accountability to Law of Heads of State and Government: Practice”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 12

Feb 9 --Jean-Francois Gaudreault-DesBiens, “The “Principle of Federalism” and the Legacy of the Patriation and Quebec Veto References”, *Supreme Court Law Review* (2011), 54 S.C.L.R. (2d)

--Peter Russell, “The Patriation and Quebec Veto References: The Supreme Court Wrestles with the Political Part of the Constitution”, *Supreme Court Law Review* (2011), 54 S.C.L.R. (2d)

Feb 16 --Radhakrishnan Persaud, “Resort to the Supreme Court through the Reference Procedure: Use of the Judicial Advisory Mechanism in Canadian Political Law”, *Journal of Parliamentary and Political Law* (Toronto: Carswell, 2011)

--Gregory Tardi, “The Professional Focus of Political Law: Accountability to Law” (2016), *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 10

Mar 2 --Gregory Tardi, “The Practice of Political Law in the Judicial Branch”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 9

--Gregory Tardi, “The Need for a Concept of Political Law”, *The Theory and Practice of*

Political Law (Toronto: Carswell, 2016), Ch. 14

Mar 9 --“Political Accountability for Appointments to the Supreme Court of Canada” Dr. John D. Whyte (Prof. and Dean Emeritus of Queen’s Law School).

--The Promise and Limits of Cooperative Federalism as a Constitutional Principle,
Prof. Warren J. Newman (Draft Paper)

Mar 16 --Gregory Tardi, “The Modern Law, Policy and Politics Scene”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 6

--Gregory Tardi, “Patterns of Scenarios in Political Law”, *The Theory and Practice of Political Law* (Toronto: Carswell, 2016), Ch. 13

Mar 23 ****RESEARCH PAPER DUE****

March 30 --Pierre Elliot Trudeau, “Fatal Tilt: Speaking Out About Sovereignty”, *Point of View* (Toronto: Harper Collins, 1991)

Apr 6 TBD

CRITERIA FOR EVALUATION OF PARTICIPATION

Grade	Discussion	Reading
90-100%	Excellent: leads debates; offers analysis and comments; always has ideas on theme of readings; takes care not to dominate; asks insightful questions.	Has completed readings and is able to address questions formulated by instructor, and pose new ones based on the readings; Relates assigned material to other course material.
80%	Very Good: Usually has thoughtful comments and questions; able and frequent contributor.	Has completed readings; is able to integrate assigned material to other course material.
60%	Good: Has basic grasp of key concepts and ideas on the main theme of the reading; arguments are at times incomplete or poorly supported; rarely asks questions.	Has completed readings but does not demonstrate critical analysis of readings in response to questions posed by instructor. Rarely able to relate assigned material to other course material .
40%	Somewhat Poor: Remarks in class demonstrate poor or incomplete understanding of concepts; seldom contributes to discussions; often disagrees or disrupts discussions.	Displays marginal familiarity with assigned material; unable to knowledgably respond to questions posed by the instructor or others; is unable to relate assigned material to other course material.
20%	Poor: Speaks rarely or never;	Demonstrates little or no

	demonstrates no understanding into key themes or topics.	familiarity with assigned material.
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Please note that it is the obligation of every student to familiarize him/herself with the University's policy on academic integrity – Guidelines for avoiding Plagiarism. The School of Public Policy and Administration “considers breaches of the Senate Policy on Academic Honesty to be a serious matter” (see below). “The Policy on Academic Honesty is an affirmation and clarification for members of the University of the general obligation to maintain the highest standards of academic honesty. As a clear sense of academic honesty and responsibility is fundamental to good scholarship, the policy recognizes the general responsibility of all faculty members to foster acceptable standards of academic conduct and of the student to be mindful of and abide by such standards.”

IMPORTANT COURSE INFORMATION FOR STUDENTS

From the Senate Committee on Curriculum & Academic Standards

Academic Honesty and Integrity

York students are required to maintain high standards of academic integrity and are subject to the Senate Policy on Academic Honesty.

Senate Policy on Academic Honesty / summary of offences against the standards of academic honesty and penalties: <https://secretariat-policies.info.yorku.ca/policies/academic-honesty-senate-policy-on/>

Academic honesty and integrity

In this course, we strive to maintain academic integrity to the highest extent possible. Please familiarize yourself with the meaning of academic integrity by completing SPARK's Academic Integrity module at the beginning of the course. Breaches of academic integrity range from cheating to plagiarism (i.e., the improper crediting of another's work, the representation of another's ideas as your own, etc.). All instances of academic dishonesty in this course will be reported to the appropriate university authorities, and can be punishable according to the Senate Policy on Academic Honesty.

Student Conduct in the Learning Environment

York University is committed to fostering teaching and learning environments that are free of disruptive and/or harassing behaviour, are physically safe, and conducive to effective teaching and learning. Students and instructors are expected to maintain a professional relationship characterized by courtesy, civility, and mutual respect and to refrain from actions disruptive to such a relationship. Individuals who fail to adhere to such standards and who violate University or public law may be subject to disciplinary action by the University. For more information, see the policies on Disruptive and/or Harassing Behaviour in Academic Situations, the Student Conduct and Responsibilities, and the Code of Student Rights & Responsibilities.

Netiquette for eClass and Online Learning

Students and instructors have a joint responsibility to create and maintain a welcoming and inclusive learning environment. All students are expected to conduct themselves in accordance with the Code of Student Rights and Responsibilities. Please review and familiarize yourself with behaviours that support “netiquette” in virtual classrooms by consulting the Guide to Netiquette and Student Guide to eLearning

Student Conduct

Students and instructors are expected to maintain a professional relationship characterized by courtesy and mutual respect and to refrain from actions disruptive to such a relationship. Moreover, it is the responsibility of the instructor to maintain an appropriate academic atmosphere in the classroom, and the responsibility of the student to cooperate in that endeavour. Further, the instructor is the best person to decide, in the first instance, whether such an atmosphere is present in the class. A statement of the policy and procedures involving disruptive and/or harassing behaviour by students in academic situations is available on the York website.

Turnitin

To promote academic integrity in this course, students will be normally required to submit their written assignments to Turnitin (via the course Moodle) for a review of textual similarity and the detection of possible plagiarism. In so doing, students will allow their material to be included as source documents in the Turnitin.com reference database, where they will be used only for the purpose of detecting plagiarism. The terms that apply to the University's use of the Turnitin service are described on the Turnitin.com website.

Access/Disability

York provides services for students with disabilities (including physical, medical, learning and psychiatric disabilities) needing accommodation related to teaching and evaluation methods/materials. It is the student's responsibility to register with disability services as early as possible to ensure that appropriate academic accommodation can be provided with advance notice. You are encouraged to schedule a time early in the term to meet with each professor to discuss your accommodation needs. Failure to make these arrangements may jeopardize your opportunity to receive academic accommodations.

Religious Observance Accommodation

York University is committed to respecting the religious beliefs and practices of all members of the community, and making accommodations for observances of special significance to adherents. Should any of the dates specified in this syllabus for an in-class test or examination pose such a conflict for you, contact the Course Director within the first three weeks of class. Similarly, should an assignment to be completed in a lab, practicum placement, workshop, etc., scheduled later in the term pose such a conflict, contact the Course director immediately. Please note that to arrange an alternative date or time for an examination scheduled in the formal examination periods (December and April/May), students must complete an Examination Accommodation Form, which can be obtained from Student Client Services, Student Services Centre or online at [Religious Accommodation Agreement - Final Examinations](#)

Information on important dates: <http://www.registrar.yorku.ca/enrol/dates/fw15.htm>

Grades and grading schemes | Definitions of Grading Descriptions

<http://calendars.registrar.yorku.ca/2015-2016/academic/grades/>

Except for courses taken under the pass/fail option, courses in the undergraduate Faculties represented in this publication are graded according to the following scale. The grade point values are used to compute averages. For information regarding the pass/fail option regulations, refer to the grading information available in your Faculty's section of the Undergraduate Calendar.

Note: only courses taken at York University are included in the grade point averages. The percentages indicated are not part of the official grading scheme and are meant only to be used as guidelines. The

letter-grade system is the fundamental system of assessment of performance in undergraduate programs at York University.

GRADE	GRADE POINT	PERCENT RANGE	DESCRIPTION
A+	9	90-100	Exceptional
A	8	80-89	Excellent
B+	7	75-79	Very Good
B	6	70-74	Good
C+	5	65-69	Competent
C	4	60-64	Fairly Competent
D+	3	55-59	Passing
D	2	50-54	Marginally Passing
E	1	40-49	Marginally Failing
F	0	0-39	Failing

Note: all of the above-noted grades are used to calculate averages and credits.

A+ Exceptional. Thorough knowledge of concepts and/or techniques and exceptional skill or great originality in the use of those concepts/techniques in satisfying the requirements of an assignment or course.

A Excellent. Thorough knowledge of concepts and/or techniques together with a high degree of skill and/or some elements of originality in satisfying the requirements of an assignment or course.

B+ Very Good. Thorough knowledge of concepts and/or techniques together with a fairly high degree of skill in the use of those concepts/techniques in satisfying the requirements of an assignment or course.

B Good. Good level of knowledge of concepts and/or techniques together with considerable skill in using them to satisfy the requirements of an assignment or course.

C+ Competent. Acceptable level of knowledge of concepts and/or techniques together with considerable skill in using them to satisfy the requirements of an assignment or course.

C Fairly Competent. Acceptable level of knowledge of concepts and/or techniques together with some skill in using them to satisfy the requirements of an assignment or course.

D+ Passing. Slightly better than minimal knowledge of required concepts and/or techniques together with some ability to use them in satisfying the requirements of an assignment or course.

D Barely Passing. Minimum knowledge of concepts and/or techniques needed to satisfy the requirements of an assignment or course.

E Marginally Failing.

F Failing.

Assignment Submission: Proper academic performance depends on students doing their work not only well, but on time. Accordingly, assignments for this course must be received on the due date specified for the assignment. Assignments are to be handed in class.

Lateness Penalty: Assignments received later than the due date will be penalized. Exceptions to the lateness penalty for valid reasons such as illness, compassionate grounds, etc., may be entertained by the Course Instructor but will require supporting documentation (e.g., a medical doctor's letter).

Missed Tests: Students with a documented reason for missing a course test, such as illness, compassionate grounds, etc., which is confirmed by supporting documentation (e.g., medical doctor's letter) may request accommodation from the Course Instructor, viz., allowed to write a make-up test. Further extensions or accommodation will require students to submit a formal petition to the Faculty.

YORK UNIVERSITY LIBRARIES IN THE CURRENT SITUATION

In response to the current situation York University Libraries (YUL) has significantly expanded ebook content, including:

- Over 13000 ebook titles from Cambridge University Press, providing electronic access to all titles available in the humanities and social sciences published 2017 or earlier.
- Almost 6000 ebook titles on the deGruyter platform, providing access to all titles across all subject areas published 2017-2020 from Columbia, Cornell, Harvard, Princeton, Rutgers, Stanford, University of California, University of Pennsylvania, and Yale university presses.

Additionally, many publishers have made select content available temporarily, these collections include:

JSTOR Books

44 publishers have agreed to make more than 30,000 books freely available to libraries through the JSTOR platform. Publishers include Yale University Press, Columbia University Press, and the African Books Collective.

Access is available until June 30, 2020.

Access here: https://ocul-yor.primo.exlibrisgroup.com/permalink/01OCUL_YOR/q36jf8/alma991036232694805164

Bloomsbury Collections

Delivers online access to scholarly books from Bloomsbury's Academic division. Spanning the arts, humanities and social sciences, the site features the latest research publications from Bloomsbury, T&T Clark, The Arden Shakespeare and Hart Publishing, alongside scholarship from historic imprints Continuum, Berg and Bristol Classical Press.

Access available until May 31, 2020

Access here: <http://ezproxy.library.yorku.ca/login?url=https://www.bloomsburycollections.com/>

Flipster

Access digital magazines on your mobile device with Flipster, the digital magazine newsstand from EBSCO. Flipster provides access to over 1800 magazines. Instructors can link to over 150 Canadian titles including Maclean's, business magazines (Forbes, Businessweek, Bloomberg), Art and Architecture (ArtNews, Architecture Digest) and other class-related subjects. Most are unlimited users, while a few are 500 concurrent users. There are also magazines that could be used for professional development or

just “getting your mind off of everything” browsing type titles as well.

Access is available until June 23, 2020

Access here:

<https://search.ebscohost.com/login.aspxauthtype=ip,uid&custid=s2867684&groupid=trial&profile=eon&user=s2867684&password=tri@12020>

If you require specific titles that are not included in these collections, please do not hesitate to contact me or write directly to the Content Development and Analysis Department at yul_cda@yorku.ca.

Additional Resources and Key Contacts (including requesting online films & videos):

- imagelib@yorku.ca - to order films or inquire about online streaming of film and videos
- [OER 101](#) - for those faculty wishing to explore freely available online options for course textbooks/materials
- Creating permanent links to available online content: [Creating Permalinks to York Libraries' Resources](#)
- General inquiries: library@yorku.ca
- Library Research Guides (subject list) available here: <https://researchguides.library.yorku.ca/?b=s>
- Online/telephone Research Assistance for students - information available here: <https://www.library.yorku.ca/web/ask-services/>
- YUL is also looking into providing online instruction videos and information literacy classes, but for now research and writing instruction are available through the online tutorial SPARK: <https://spark.library.yorku.ca/>