

Politics 4P19/5P19: *The Canadian Judicial Process*
Brock University, Winter 2018

Instructor: Matthew Hennigar
Office: Plaza 343
Phone: 905 688-5550 ext. 4474
E-mail: matthew.hennigar@brocku.ca

Class Time: Thur 1:00-3:50pm
Classroom: MCD 404
Office Hours: Thur 4-5pm
and by appointment

Course Description

This course provides an in-depth exploration of the Canadian judiciary's structure, functions, and political roles. We will examine: the judiciary's institutional framework; the human dimension of judging—for example, decision-making and appointment; the policy impact of judicial rulings; and players in the judicial process, including interest groups and governments. Particular attention will be paid to the criminal justice process, and how the judicial system has been influenced by the Charter of Rights and Freedoms. Although the course primarily uses a seminar discussion format, this will be supplemented with in-class smaller group activities, and mini-lectures by the instructor.

Course Learning Objectives

Students will be expected to leave the course with not only a greater technical understanding of the judicial process in Canada, but a better appreciation of the legal dimension of politics and the politics of law. More specifically, students will be expected to:

- demonstrate a critical understanding of leading issues in this area, including judicial selection, judicial independence and accountability, access to justice, the legitimacy of judicial review, and the role of courts in the policy process
- through the research paper, develop a sustained, critical argument about an aspect of Canada's judiciary using leading scholarly sources, in a manner consistent with academic integrity
- articulate their understanding of the course material both in writing and verbally in a seminar environment
- engage respectfully with the class in discussions and debates
- through course readings and the independent research project, demonstrate familiarity with interdisciplinary scholarship on courts from political science and law, and potentially also criminology, sociology, and psychology.

Required Texts (Available at the Brock University Bookstore)

Lori Hausegger, Matthew Hennigar, and Troy Riddell, *Canadian Courts: Law, Politics, and Process*, 2nd ed. Oxford University Press, 2015. ['HHR' in weekly schedule below]

For copyright reasons and to save you money, this course makes use of library reserves (including several e-readings) and our Isaak page rather than a coursepack from the bookstore. Please note, most reserves are available in electronic format. Apologies in advance for any inconvenience.

Course Requirements	
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Seminar Participation	30%	
Memos	20%	(weekly, choice of 8)
Research Proposal	10%	(Mar 8, 2018 in class)
Term Paper	40%	(by noon Monday, April 9, 2018)

Requests for extra work will not be granted (ex., seminars missed without an acceptable explanation).

Seminar Participation

As a seminar, this course is based on the active involvement of all participants. Accordingly, attendance at weekly seminars is mandatory, and you should complete assigned readings before class and be prepared to contribute meaningfully to in-class discussion. You will be graded on your ability to make original points, to engage other students' comments, and to incorporate the readings in your comments. **NOTE:** Smart phone use is not permitted in seminar; they are a distraction and texting during a discussion shows disrespect for other students. As several seminar readings are in electronic format, laptops and tablets can be used but please don't let them become a distraction.

Memos

You will write **eight** short (500-600 word) memos throughout the term, which analyse the readings for a particular seminar. To clarify, this means you have some choice. Doing these memos helps ensure that class participants are prepared to engage in productive discussions. The memos should not simply summarize the readings, but integrate them—what are the central arguments of the readings, and how do the readings relate to each other? Memos must be submitted to me via the **Messages** function in **Isaak** for this course by the end of the **Wednesday** before that seminar.

Research Proposal Requirements

The research proposal is 3-4 pages (4P19)/5-6 pages (5P19) in length **PLUS** a preliminary bibliography, and is due in class. The research proposal will discuss the central question to be explored in the paper (something pertaining to the Canadian judicial system), a working hypothesis/thesis statement and a brief review of the relevant literature. You should aim for 6-10 sources, which should be primarily books and journal articles—don't use more than a couple of internet sites, if any. All topics must be approved by the instructor. Make sure to keep your returned proposal, as you will need to submit the graded copy with your term paper.

Research Paper Requirements

The length of the research paper for Politics 4P19 is 4500-5000 words (~15 pages) and for Politics 5P19 6000-6500 words (20-22 pages). The term paper must be double-spaced with 1" margins and a 12 point font, and use an accepted citation style consistently. The term paper is an independently designed research project by the student and approved by the instructor, and is based on the research proposal submitted during the term. [NOTE: An extended literature review of a subject might be a suitable topic.] There are an almost unlimited number of possible topics for this course, but here are some suggestions below—you are not restricted to these, and in most cases, it will be necessary to narrow the suggested topic. As the paper topic is open, this course uses the electronic plagiarism detection service Turnitin.com, which is integrated into the **Assignments** tool in Isaak—you will thus need to submit a hardcopy and also upload your paper to Isaak. If you object to uploading your assignments to Turnitin.com for any reason, please notify the instructor to discuss alternatives.

- Judicial appointment in Canada – evaluate existing system, proposals for reform; democratic input vs. greater “professionalization”/bureaucratization; etc.
- Judicial independence – what does it mean? How secured in Canada? How much is enough? discipline of judges without removal; possible links between independence and appointment
- Politicization of the judiciary, especially the SCC; evaluate whether positive development
- Role of interest groups in courts; litigation strategies; success rate
- Alternative dispute resolution (mediation, arbitration; small claims courts, circle sentencing, etc.)
- Criminal justice (many topics possible here: impact of Charter; judicial discretion over sentencing; young offenders; “criminalization” of public policy; due process vs. crime control vs. victims’ rights models vs. restorative justice; separate Aboriginal justice systems; etc.)
- Judicial decision-making – impact of ideology, gender, ethnicity, religion, region, etc.
- Policy impact of courts – could focus on a particular policy area, apply models of impact
- Access to justice – cost of lawyers and litigation; legal aid; possible reforms

Penalties for Late Assignments

A **FIVE (5) PER CENT PER DAY** penalty will be assigned for late assignments (except memos, which are not accepted after due date). Extensions of due dates are granted only in circumstances that are beyond the student’s control, such as health problems that are supported by a medical certificate, or other clearly equivalent situations. Time management problems are not grounds for extensions. Start early! Papers more than one week overdue without documentation will not be accepted.

<i>Brock University Academic Policies</i>
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- The last day to withdraw without academic penalty is **Friday, March 9, 2018**. You will receive at least 15% of your final grade by March 2, 2018.
- If you require academic accommodations related to a documented disability to participate in this course, please contact Student Accessibility Services in the Student Development Centre (4th floor Schmon Tower, ext. 3240). You are also encouraged to discuss any accommodations with the instructor well in advance of due dates and scheduled assessments.
- Brock University acknowledges the pluralistic nature of the undergraduate and graduate communities such that accommodations will be made for students who, by reason of religious obligation, must miss an examination, test, assignment deadline, laboratory or other compulsory academic event. Students requesting academic accommodation on the basis of religious obligation should make a formal, written request to their instructor(s) for alternative dates and/or means of satisfying requirements as soon as possible.
- The University will accommodate students whose studies become interrupted, or who may be unable to complete academic work, due to an incapacitating medical condition. In these situations, the student must complete the [Brock University Student Medical Certificate](#) and include any relevant medical documentation to support his/her request for academic accommodation based on medical grounds. The University may, at its discretion, request more detailed documentation in certain cases.

- **Intellectual Property Notice:** All slides, presentations, handouts, tests, exams, and other course materials created by the instructor in this course are the intellectual property of the instructor. A student who publicly posts or sells an instructor's work, without the instructor's express consent, may be charged with misconduct under Brock's Academic Integrity Policy and/or Code of Conduct, and may also face adverse legal consequences for infringement of intellectual property rights.

<i>Tentative Schedule and Readings</i>

Please Note: All the readings are from the required textbook, on reserve at the library, or available electronically where indicated (please see course Isaak page at <https://lms.brocku.ca>).

Jan 11 ***Introduction: Judicial Process, Law, and Politics***

HHR (textbook), preface & ch. 1

Paul Howe and Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001), 3-26. [reserve, e-book via library or Isaak]

Jan 18 ***Canadian Courts: Structure and Access***

HHR, ch. 2 & 3

Jan 25 ***Judicial Decision Making***

HHR, ch. 4

F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview, 2000), ch. 2 (pgs. 33-58). [reserve, Isaak]

Bertha Wilson, "Decision-making in the Supreme Court of Canada," (543-6) and "Will Women Judges Really Make a Difference?" (147-152) in F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada*, 3rd edition (Calgary: U of Calgary Press, 2002). [reserve, e-book via library or Isaak]

Supplemental readings (not required, but for further interest or research papers):

E. Macfarlane, *Governing from the Bench: the Supreme Court of Canada and the Judicial Role* (UBC Press, 2013).

D. Songer, et al. *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (MQUP, 2012).

D. Songer and S. Johnson, "Judicial Decision Making In the Supreme Court of Canada: Updating the Personal Attribute Model," *Canadian Journal of Political Science* 40:4 (Dec. 2007), 911-934.

Feb 1 ***Judicial Appointment***

HHR, ch. 5

Lorraine Snyder, "Reference re Supreme Court Act: Defining Appointments to Canada's Highest Court," Centre for Constitutional Studies (8 Oct. 2014) [Isaak; for original ruling, see *Reference re Supreme Court Act*, ss. 5 and 6, SCC 21, [2014] 1 S.C.R. 433 also on Isaak]

Sean Fine, "Opinions Divided over Supreme Court Pick," *The Globe and Mail* (November 17, 2017), A.3. [Isaak]

"Prime Minister Announces New Supreme Court of Canada Judicial Appointments Process,"

<http://pm.gc.ca/eng/news/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial-appointments-process> (2 Aug. 2016) [Isaak]

Feb 8 ***Judicial Independence***

HHR, ch. 6

Peter McCormick, “New Questions about an Old Concept: The Supreme Court of Canada’s Judicial Independence Decisions,” *Canadian Journal of Political Science* 37 (2004), 839-862. [Isaak]

Feb 15 ***Players in the Process: Lawyers and the Legal Profession***

Steven Vago and Adie Nelson, *Law & Society: Canadian Edition* (Toronto: Pearson Prentice Hall, 3rd Canadian Edition, 2011), ch. 8. [Isaak]

Robert W. Gordon, “Commentary: The Law School, The Profession, and Arthurs’ Human Professionalism,” *Osgoode Hall Law Journal* 44:1 (2006), 157-166. [Isaak]

D. Tong and W. Wesley Pue, “The Best and the Brightest? Canadian Law School Admissions,” *Osgoode Hall Law Journal* 34:1 (1999), 843-879. [Isaak]

FEB 19-23 **READING WEEK****Mar 1** ***Players in the Process: Interest Groups***

HHR, ch. 7

Elizabeth Thompson, “Comeback for the Court Challenges Program?” *Law Times* (May 14, 2016) [Isaak]

Ian Brodie, “The Court Challenges Program Rises Once Again,” *Policy Options* (April 21, 2016) [Isaak]

Supplemental readings:

F.L. Morton and Rainer Knopff, *The Charter Revolution & the Court Party* (Broadview Press, 2000).

Holly McCammon and Allison McGrath, “Litigating Change? Social Movements and the Court System,” *Sociology Compass* 9:2 (2015), 128–139.

Lisa Vanhala, *Making Disability Rights a Reality? Disability Rights Activists and Legal Mobilization in Canada and the United Kingdom* (Cambridge University Press, 2011).

Mar 8 ***Players in the Process: Governments*** **[proposals due]**

HHR, ch. 8

James Kelly and Matthew Hennigar, “The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review within a Constitutional Charter of Rights,” *International Journal of Constitutional Law* 10, no. 1 (2012): 35-68. [Isaak]

Kent Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law,” *Queen’s Law Journal* 31 (2006): 598-643. [Isaak]

Mar 15 ***The Criminal Justice System: Crime Control, Due Process, and Victims’ Rights Models***
[proposals returned]

HHR, ch. 9

Kent Roach, *Due Process and Victims’ Rights* (Toronto: University of Toronto Press, 1999), 3-50 [introduction and ch. 1]; 310-319 [ch. 10] [reserve, e-book via library or Isaak] **[cont’d ↓]**

(Justice) Renee Pomerance, "New Approaches to Sentencing in Canada: Reflections of a Trial Judge," *Canadian Criminal Law Review* 17 (2013): 305-326. [Isaak]

Leslie MacKinnon, "Supreme Court further dismantles Harper government's tough-on-crime agenda," *iPolitics* (15 Apr. 2016) <https://ipolitics.ca/2016/04/15/supreme-court-further-dismantles-harper-governments-tough-on-crime-agenda/> [Isaak]

Mar 22 ***Restorative Justice, & Aboriginals in the Criminal Justice System***

David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012), chapters 1, 2, 3, 4 and 7 [reserve]

Annalise Acorn, *Compulsory Compassion: a Critique of Restorative Justice* (Vancouver: UBC Press, 2004), ch. 3 (46-77). [e-book via Library, Isaak—pages 60-91 in e-book search]

***Want more background? See Kent Roach, Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999), 250-277 (ch. 8). [e-book]

Mar 29 ***Civil Law Disputes***

HHR, ch. 10

Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches*, A Report for the Canadian Bar Association (Ottawa: Canadian Bar Association, June 2010), 1-13, 55-65 (**all page #s in document, not PDF page numbers**). [Isaak]

Melina Buckley, "Canadian Bar Association will Litigate Right to Civil Legal Aid," *The Lawyers Weekly* (April 15, 2005). [Isaak]

Tracey Tyler, "B.C. Judge Rejects Legal Aid Test Case," *Toronto Star* (Sep 7, 2006), A9. [Isaak]

Apr 5 ***Courts and Policymaking: Policy Impact***

HHR, ch. 11

Howe and Russell, eds., *Judicial Power and Canadian Democracy*, 106-117. [reserve, e-book]

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd edition (Chicago: University of Chicago Press, 2008), 1-36; 420-429 (ch. 1 & 14). [whole book on reserve]

Troy Q. Riddell, "The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones outside Quebec," *Law and Society Review* 38:3 (2004), 583-610. [Isaak]

Some useful course-related websites:

The Supreme Court of Canada (personnel, decisions): <http://www.scc-csc.ca>

Justice Department Canada (organization, programs, laws): <http://canada.justice.gc.ca/>

Canadian Legal Information Institute (laws, court and tribunal decisions): www.canlii.org

Centre for Constitutional Studies, U of Alberta (case commentaries): ualawccsprod.srv.ualberta.ca/

LAWSOURCE database for many full-text law review articles, index to Canadian legal literature, and cases.

Some Suggested Supplemental Reading Material (for further interest or term paper research)

- Acorn, Annalise. *Compulsory Compassion: a Critique of Restorative Justice*. Vancouver: UBC Press, 2004.
- Anderson, Ellen. *Judging Bertha Wilson: Law as Large as Life*. Toronto: Osgoode Society and U of T Press, 2001.
- Baier, Gerald. *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada*. Vancouver: UBC Press, 2006.
- Baker, Dennis. *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation*. Montreal: McGill-Queen's University Press, 2010.
- Baum, Lawrence. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press, 1997.
- Baum, Lawrence. *Judges and their Audiences: a Perspective on Judicial Behavior*. Princeton: Princeton University Press, 2006.
- Bushnell, Ian. *The Captive Court: A Study of the Supreme Court of Canada*. Montreal: McGill-Queen's University Press, 1992.
- Cameron, Alex M. *Power without Law: The Supreme Court of Canada, the Marshall Decisions and the Failure of Judicial Activism*. Montreal: McGill-Queen's University Press, 2009.
- Coates, Ken. *The Marshall Decision and Native Rights*. Montreal & Kingston: McGill-Queens, 2000.
- Final report and recommendations of the Judicial Appointments Advisory Committee*. Toronto: Judicial Appointments Advisory Committee, 1992.
- Fletcher, Joseph F. and Paul Howe. *Public Opinion and the Courts*. Montreal: Institute for Research on Public Policy, 2000.
- Friedland, Martin L. *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa: Canadian Judicial Council, 1995.
- Greene, Ian. *The Charter of Rights and Freedoms: 30+ Years of Decisions that Shape Canadian Life*. Toronto: Lorimer, 2014.
- Greene, Ian. *The Courts*. Vancouver: UBC Press, 2006.
- Greene, Ian, Carl Baar, Peter McCormick, George Szablowski and Martin Thomas. *Final Appeal*. Toronto: Lorimer, 1998.
- Hiebert, Janet. *Charter Conflicts: What is Parliament's Role?* Montreal: McGill-Queens, 2002.
- Horowitz, Donald L. *The Courts and Social Policy*. Washington, DC: The Brookings Institution, 1977.
- Kelly, James B. *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*. Vancouver: UBC Press, 2006.
- Knopff, Rainer, and F.L. Morton. *Charter Politics*. Toronto: Nelson, 1992.
- Macfarlane, Emmett. *Governing from the Bench: the Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013).
- Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Thompson, 1994.
- Manfredi, Christopher. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd Ed. Toronto: Oxford University Press, 2001.
- Manfredi, Christopher. *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund*. Vancouver: UBC Press, 2004.
- McCormick, Peter. *Supreme At Last: the Evolution of the Supreme Court of Canada*. Toronto: Lorimer, 2000.
- Muttart, Daved. *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada*. Toronto: University of Toronto Press, 2007.

- Ostberg, Cynthia L. and Matthew E. Wetstein. *Attitudinal Decision Making in the Supreme Court of Canada*. Vancouver: UBC Press, 2007.
- Paciocco, David. *Getting Away with Murder: the Canadian Criminal Justice System*. Toronto: Irwin Law, 1999.
- Roach, Kent. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Toronto: Irwin Law, 2001.
- Russell, Peter, Rainer Knopff, Thomas M.J. Bateman and Janet L. Hiebert. *The Court and the Constitution: Leading Cases*. 2d edition. Toronto: Emond, 2017.
- Russell, Peter and David M. O'Brien, eds. *Judicial Independence in the Age of Democracy*. University Press of Virginia: Charlottesville and London, 2001.
- Sauvageau, Florian, David Schneiderman, and David Taras. *The Last Word: Media Coverage of the Supreme Court of Canada*. Vancouver: UBC Press, 2006.
- Saywell, John T. *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. Toronto: Osgoode Society and U of T Press, 2002.
- Schneiderman, David and Kate Sutherland, eds. *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*. Toronto: University of Toronto Press, 1997.
- Sharpe, Robert J. and Kent Roach. *Brian Dickson: A Judge's Journey*. Toronto: University of Toronto Press, 2003.
- Smith, Miriam. *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995*. Toronto: University of Toronto Press, 1999.
- Snell, James G. and Frederick Vaughan. *The Supreme Court of Canada: History of the Institution*. Toronto: University of Toronto Press, 1985.
- Songer, Donald. *The Transformation of the Supreme Court of Canada: an Empirical Examination*. Toronto: UTP, 2008.
- Stenning, Philip C., ed. *Accountability for Criminal Justice: Selected Essays*. Toronto: University of Toronto Press, 1995.
- Vanhala, Lisa. *Making Disability Rights a Reality? Disability Rights Activists and Legal Mobilization in Canada and the United Kingdom*. Cambridge: Cambridge University Press, 2011.
- Verrelli, Nadia, ed. *The Democratic Dilemma: Reforming Canada's Supreme Court*. Kingston, ON: Queen's Policy Studies, 2013.
- von Hirsch, Andrew, et al., eds. *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Portland, OR: Hart, 2003.
- Wetstein, Matt and Cynthia Ostberg. *Value Change in the Supreme Court of Canada*. Toronto: University of Toronto Press, 2017.
- Young, Alan. *Justice Defiled: Perverts, Potheads, Serial Killers and Lawyers*. Toronto: Key Porter Books, 2003.

DEPARTMENT OF POLITICAL SCIENCE

STATEMENT ON ACADEMIC MISCONDUCT

Academic misconduct is a serious offence. The principle of academic integrity, particularly of doing one's own work, documenting properly (including use of quotation marks, appropriate paraphrasing and referencing/citation), collaborating appropriately, and avoiding misrepresentation, is a core principle in university study. Students should consult Section VII, "Academic Misconduct", in the "Academic Regulations and University Policies" entry in the Undergraduate Calendar, available at <http://brocku.ca/webcal> to view a fuller description of prohibited actions, and the procedures and penalties.

This course may use Turnitin.com, phrase-matching software. If you object to uploading your assignments to Turnitin.com for any reason, please notify the instructor to discuss alternative submissions.

POLICY ON LATE ESSAYS

The policy of the Department is that essays received by the instructor or deposited in the Political Science Department essay box after 4:00 p.m. or at a time designated by the instructor, of the date on which they were due will be penalized two per cent for each day late from Monday through Friday and five per cent for the period from Friday 4:00 p.m. to Monday 8:30 a.m., and that no paper will be accepted two weeks after the due date. Papers are last collected from the essay box each weekday at 4:00. **Instructors may establish more restrictive deadlines or more severe penalties in particular courses – check the course outline.** Extensions of due dates are granted only in circumstances that are beyond the student's control, such as health problems that are supported by a medical certificate, or other, clearly equivalent situations.

An essay is considered received when the original hard copy (printed-not disk) of the paper is in the hands of the instructor or in the box outside the Political Science Department's office. (ALL ESSAYS MUST INCLUDE A TITLE PAGE WITH THE FOLLOWING INFORMATION CLEARLY MARKED: STUDENT NUMBER, TA and INSTRUCTOR'S NAME, COURSE NAME and NUMBER).

Having an essay date-stamped by security, or the library, or anyone else does not constitute receipt of the essay by the Political Science Department. Instructors may require that essays be submitted electronically through turnitin.com. In this case, students must consult with the Instructor on what constitutes a late essay.

Time management problems are not grounds for extensions. You are strongly urged to avoid these penalties by beginning to work on essays early in the term; by setting your own target dates for completion that are several days before the due date; and by carefully budgeting your time.

POLICY ON RETURNING MARKED ESSAYS

Marked essays will normally be returned during class meetings or at the final examination. Students who are not in class to receive their essays or do not receive them at the final examination can obtain them in two ways:

- directly from the instructor during his/her office hours (unless the instructor specifies in the course outline or by notice on his/her office door that this option is not available), and/or
- directly from the instructor on specific days and at specific times announced in class or posted on his/her office door.

Note: Essays that are not picked up within six months after the end of term will be shredded.