# Politics 4P19/5P19: The Canadian Judicial Process Brock University, Winter 2012

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Class Time: Fri 11:00-2:00

Classroom: PL411

Office Hours: M 12-1pm, F 10-11pm

or by appointment

# Course Description and Objectives

The goal of this course is to introduce students to the Canadian judiciary's structure, functions, and political roles. 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. To this end, 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 law and process, and how the judicial system has been influenced by the Charter of Rights and Freedoms.

# Required Texts (Available at the Brock University Bookstore)

Lori Hausegger, Matthew Hennigar, and Troy Riddell, *Canadian Courts: Law, Politics, and Process.* Oxford University Press, 2008. ['HHR' in weekly schedule below]

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

# Course Requirements

Seminar Participation	25%	
Memos	10%	
Seminar Leadership	15%	
Research Proposal	10%	(March 9, 2012 in class)
Term Paper	40%	(by noon, Wed, April. 11, 2012)

- The last day to withdraw without academic penalty is **Friday, March 9, 2012.**
- Requests for extra or substitute work will not be granted (for example, if seminars are missed).
- If you have any special needs regarding lectures or testing, please contact me and the Services for Students with disABILITIES (Schmon Tower 400) as soon as possible.

# **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.

# **Memos**

You will write **six** short (1-2 single-spaced pages) memos throughout the term, which analyse the readings for a particular seminar. To clarify, this means you have some choice—PLEASE NOTE: <u>you don't submit the week you lead the seminar</u>. 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 they relate to each other? Memos must be submitted to me via the 'Messages' function in Isaak for this course by the Thursday before that seminar.

#### **Seminar Leadership**

You will be responsible for leading discussion of the course material for at least one seminar, possibly in conjunction with another student depending on enrolment. Organizing the class discussion involves raising specific questions and issues for the week, and relating the material to previous readings and class discussions. As a discussion leader, provide a list of 5-6 questions to all students a few days *before* the class session you organize, via the Isaak Messages tool. These questions should help focus the other students as they do the readings, and provide a partial basis for class discussion. Your role as discussion leader is not to lecture the material, but to facilitate a thoughtful and active discussion of these materials, preferably through a mix of oral presentation, use of audio-visual materials and aids, well-crafted questions, and moderating discussion—do not just read your notes. Presenters must meet with me in the week before their seminar (Monday at the <u>latest</u>) to discuss how you will organize the seminar; you should come to this meeting having done the readings, and with some ideas prepared. Your mark for leadership is based in part on this meeting; failure to attend will result in a grade of zero for seminar leadership.

#### **Research Proposal Requirements**

The research proposal is 2-3 pages (4P19)/4-5 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 standard 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—you are not restricted to these, and in most cases, it will be necessary to narrow the suggested topic:

- 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 Supreme Court of Canada; evaluate whether positive development

- Trial court unification (of s.92 and s.96 courts)
- 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.)
- Alternative dispute resolution (mediation, arbitration; small claims courts, circle sentencing, etc)
- Role of the courts in Canadian federalism
- 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
- Role of interest groups in courts; litigation strategies
- Access to justice cost of lawyers and litigation; legal aid; possible reforms

# **Penalties for Late Assignments**

A hard copy of your paper must be submitted to either myself or the box outside the Political Science Department's office by **noon** on the due date. A **FIVE** (5) **PER CENT PER DAY** penalty will be assigned for late papers and proposals. 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!

# Tentative Schedule and Readings

Please Note: All the readings are mandatory and are from the required textbook, on reserve at the library, or available electronically where indicated.

# Jan 13 Introduction: Judicial Process, Law, and Politics

HHR, preface & chpt. 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]

# Jan 20 Canadian Courts: Structure and Access

HHR, chpts. 2 & 3

# Jan 27 Judicial Decision Making

HHR, chpt. 4

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

Bertha Wilson, "Decision-making in the Supreme Court of Canada," (543-6) and "Will Women Judges Really Make a Difference?" (147-52) in F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada*, 3rd edition (Calgary: U of Calgary Press, 2002). [reserve, e-book]

Suggested further reading on this topic:

- Cynthia Ostberg and Matthew Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada*. (Vancouver: UBC Press, 2007).
- Donald Songer, The Transformation of the Supreme Court of Canada: an Empirical Examination (Toronto: UTP, 2008)
- Donald R. Songer and Susan W. Johnson, "Judicial Decision Making In the Supreme Court of Canada: Updating the Personal Attribute Model," *Canadian Journal of Political Science* 40:4 (Dec. 2007), 911-34.

# Feb 3 Judicial Appointment

HHR, chpt. 5

Howe and Russell, eds., Judicial Power and Canadian Democracy, 131-64. [reserve, e-book]

- F.L. Morton, "Judicial Appointments in Post-Charter Canada: A System in Transition," in K. Malleson & P. Russell, eds., *Appointing Judges in an Age of Judicial Power* (Toronto: University of Toronto Press, 2006), 56-79. [reserve, e-book]
- Jay Beecher, "Time to Rethink the Way We Select Canada's Top Judges," *Toronto Star* (Ont.: Jan 12, 2009), AA8. [Isaak]
- MacCharles, Tonda, "Top Court Accountability an Illusion; Supreme Court judges are appointed by PM, 'nominees' just a show," *Toronto Star* (Ont: Oct 22, 2011), A6. [Isaak]
- Makin, Kirk, "Harper Government Appointments will change Face of Top Court," *Globe & Mail* (Ont: Oct 17, 2011), A4. [Isaak]

# Feb 10 Judicial Independence

HHR, chpt. 6

- Gerald Seniuk, "Judicial Independence and the Supreme Court of Canada," *Canadian Bar Review* 77 (1998), 381-401. [e-reserve]
- F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada*, 3<sup>rd</sup> edition (Calgary: University of Calgary Press, 2002), 169-82, 189-95, 201-41 [reserve, e-book].

Howe and Russell, Judicial Power and Canadian Democracy, 99-105. [reserve, e-book]

#### Feb 17 Players in the Process: Lawyers and the Legal Profession

- Neil Boyd, "The Study of Law, Lawyers, and Judges: The Evolution of the Legal Profession," *Canadian Law: An Introduction*, 4<sup>th</sup> edition (Toronto: Thomson-Nelson, 2007), 189-97. [reserve]
- Steven Vago and Adie Nelson, *Law & Society: Canadian Edition* (Toronto: Pearson Prentice Hall, 2004), chpt. 8. [reserve]
- Robert W. Gordon, "Commentary: The Law School, The Profession, and Arthurs' Human Professionalism," *Osgoode Hall Law Journal* 44:1 (2006), 157-66. [e-reserve]
- D. Tong and W. Wesley Pue, "The Best and the Brightest? Canadian Law School Admissions," *Osgoode Hall Law Journal* 34:1 (1999), 843-79. [e-reserve]
- F.M. Kay and Joan Brockman, "Barriers to Equality in the Canadian Legal Establishment," *Feminist Legal Studies* 8:2 (2000), 169-98. [e-reseve]

# February 20-24 READING WEEK

# Mar 2 Players in the Process: Interest Groups

HHR, chpt. 7

Howe and Russell, Judicial Power and Canadian Democracy, 214-254. [reserve, e-book]

Ian Brodie, Friends of the Court: The Privileging of Interest Group Litigants in Canada (Albany: SUNY Press, 2002), chapters 1, 2 & 5. [reserve, e-book]

Kirk Makin, "Tory Program Cuts Called Strike Against the Disadvantaged," *Globe and Mail*, Oct. 2, 2006, A6. [Isaak]

Suggested further reading on this topic:

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

Miriam Smith, Political Institutions and Lesbian and Gay Rights in the United States and Canada (Routledge, 2008).

# Mar 9 Players in the Process: Governments [proposals due]

HHR, chpt. 8

James Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government," *Canadian Public Administration* 42 (1999): 476-511. [e-reserve]

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]

# <u>Mar 16</u> The Criminal Justice System: Crime Control, Due Process, and Victims' Rights Models [proposals returned]

HHR, chpt. 9

Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999), 3-50; 310-319 [reserve, e-book]

Kent Roach, "A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?," *Supreme Court Law Review*, Vol. 40 (2008): 717-59. [reserve]

# Mar 23 Restorative Justice & Aboriginals in the Criminal Justice System

Law Commission of Canada, "From Restorative Justice to Transformative Justice: Discussion Paper," (Ottawa: Law Commission of Canada, 1999) [see Isaak link, or visit: <a href="http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/from\_restorative\_justice-e/paper.html">http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/from\_restorative\_justice-e/paper.html</a>]

Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999), 250-277. [reserve, e-book]

The John Howard Society of Alberta, *Towards a Separate Justice System for Aboriginal Peoples* (1992). [Isaak]

"Communities and the challenge of conflict: perspectives on restorative justice" (videorecording, Ottawa, ON: Law Commission of Canada, 2000). \*\*we will view this in class\*\*

# Mar 30 Civil Law Disputes

HHR, chpt. 10 [cont'd  $\downarrow$ ]

- 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]

# Friday, April 6 Good Friday, University Closed

#### Monday, April 9 [Friday schedule] Courts and Policymaking: Policy Impact

HHR, chpt. 11

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2<sup>nd</sup> edition (Chicago: University of Chicago Press, 2008), 1-36; 420-9 (chapters 1 & 14). [reserve]

Judicial Power and Canadian Democracy, 106-117. [reserve, e-book]

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. [e-reserve]

#### 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.

Peter Russell, Rainer Knopff, Thomas M.J. Bateman and Janet L. Hiebert. *The Court and the Constitution: Leading Cases*. Toronto: Emond Montgomery, 2008.

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.

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 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.

Knopff, Rainer, and F.L. Morton. Charter Politics. Toronto: Nelson, 1992.

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.

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.

Russell, Peter and David M. O'Brien, eds. *Judicial Independence in the Age of Democracy*. University Press of Virginia: Charlottesville and London, 2001.

von Hirsch, Andrew, et al., eds. Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms? Portland, OR: Hart, 2003.

Young, Alan. Justice Defiled: Perverts, Potheads, Serial Killers and Lawyers. Toronto: Key Porter Books, 2003.

See also:

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

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

Canadian Legal Resources: <a href="http://www.gahtan.com/cdnlaw/">http://www.gahtan.com/cdnlaw/</a>

Jurist Canada: <a href="http://jurist.law.utoronto.ca/">http://jurist.law.utoronto.ca/</a>

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

# DEPARTMENT OF POLITICAL SCIENCE

#### STATEMENT ON ACADEMIC MISCONDUCT

Because academic integrity is vital to the well-being of the university community, Brock University takes academic misconduct very seriously. Academic misconduct includes plagiarism, which involves presenting the words and ideas of another person as if they were your own, and other forms of cheating, such as using crib notes during a test or fabricating data for a lab assignment. The penalties for academic misconduct can be very severe. A grade of zero may be given for the assignment or even for the course, and a second offense may result in suspension from the University. Students are urged to read the section of the Brock University Undergraduate Calendar that pertains to academic misconduct. Students are also reminded that the Student Development Centre (Schmon Tower, Room 400) offers free workshops on writing and study skills and on avoiding plagiarism.

# **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.

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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.

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<u>Instructors may establish more restrictive deadlines or more severe penalties in particular courses – check the course outline</u>. 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.

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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.