

MCGILL UNIVERSITY  
DEPARTMENT OF POLITICAL SCIENCE

**POLI 378—CANADIAN JUDICIAL PROCESS**

**F. 2018**

Instructor: Alain-Guy Sipowo, LL.D  
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Class time: W.F. 2:35 – 3:55  
Classroom: STBIO N2/2  
Office hours: TBD

**1 – Course description**

This course is about the interactions between the judicial and the political systems of Canada. We examine the relationship between law process and politics. We will see how the adjudicative power constraints the political and executive branches of the government. In that regard, we will survey actors and institutions that shape Canada's judicial process. At the end of the course, the student will be able to critically appraise the basic structure and processes of the judicial system, judicial nominations and judicial decision-making.

**2 – Course prerequisites**

There is no formal prerequisite to take this course.

**3 – Course format**

The class usually meets twice a week for lectures. Lectures build on a list of mandatory readings; students should have a good grasp of the materials prior to class so as to fully benefit from lectures and discussions.

Conferences will begin in the third week of the term. Each student will sign up for one of the conference groups on Minerva. Weekly attendance is mandatory. Led by teaching assistants (TAs), conferences are meant to discuss course issues in a smaller format as well as to perform more practical activities, **such as writing notes on the week's reading, making an oral presentation of it and engaging in a discussion with peers.**

**4 – Course materials**

**The mandatory textbook for this course** is Lori Hausegger, Matthew Hennigar, and Troy Riddel, *Canadian Courts: Law Politics and Process*, 2<sup>nd</sup> ed. (Oxford University Press, 2015) (hereunder HHR) [Reserve];

Additionally, heavy reference will be made to F.L. Morton, ed., *Law, Politics and Judicial Process in Canada*, 3<sup>rd</sup> ed. (University of Calgary Press, 2002) (hereunder Morton) [Reserve, e-book]. But this is not an obligatory reading.

This course will make use of library reserves including several e-readings. Most reserves are available in electronic format.

## 5 – Course requirements

	Weight	Date	Description
<b>Conference Participation</b>	10%	N/A	Based on attendance, active involvement in discussions and debates, as well as preparedness. The teaching assistants will provide more details.
<b>Mid-term exam</b>	30 %	26.10.18	In-class; a combination of short-answer questions about lectures, conferences, and readings.
<b>Case comment</b>	25%	23.11.18	Pick up a court judgment in the list that will be provided on Mycourses and make a commentary of it. Typically, a commentary shall outline the facts of the case, the judicial process it has gone through, the reasoning of the Justices in coming to their decision. It shall end by drawing lessons learnt from the judgement considering its political, economic or social impact.
<b>Final Exam</b>	35%	TBA	A combination of short-answer and essay questions covering lectures, conferences and readings. Date and room to be announced by the Faculty of Arts toward the end of semester.

## 6 – Late penalties and extensions

Extensions or make-up exams are not granted except in cases consistent with the Faculty of Arts' guidelines. Be prepared to provide all the relevant documentation (medical notes with clear date indications, etc.). Students should advise the instructor about extensions prior to deadline if possible, and at most one week later.

Note that there will be no make-up exam for the midterm. Students with a legitimate excuse will be required to do a one-on-one oral examination with the instructor.

## 7 – Language of Submission:

According to McGill policy, students have the right to submit their written graded work in English or French, except when one of the learning objectives of the course is the acquiring proficiency in a language.

FRENCH TRANSLATION: « *Conformément à la Charte des droits de l'étudiant de l'Université McGill, chaque étudiant a le droit de soumettre en français ou en anglais tout travail écrit devant être noté (sauf dans le cas des cours dont l'un des objets est la maîtrise d'une langue).* »

The policy is available at: <https://www.mcgill.ca/tls/teaching/course-design/outline#policy>

## 8 – Communications policy

The best way to reach the instructor is by meeting him in person. Priority will be given on a first come, first serve basis to students who come in person to the instructor after the class. Students who have courses or commitments right after the class may set an appointment via email.

Given the large size of this course, students should refrain from emailing the instructor with questions that either: a) require extensive feedback (in which case students should meet in person with the instructor during office hours); b) are of general interest (in which case the issue should be raised at the beginning of lectures); or c) have been already answered in class (in which case students should obtain answers from fellow students who attended the missed lecture). Otherwise, legitimate email inquiries will normally be answered within two weekdays. If you do not receive a reply within this period, please resubmit your question(s).

Students are required to regularly consult the course website on mycourses for important announcements, handouts and other course-related information.

## **9 – Plagiarism**

McGill University values academic integrity. Therefore, all students must understand the meaning and consequences of cheating, plagiarism and other academic offences under the Code of Student Conduct and Disciplinary Procedures (see [www.mcgill.ca/integrity](http://www.mcgill.ca/integrity) for more information). A number of tools, including public search engines, may be used to detect plagiarism. In addition, students are not permitted to hand in the same assignment in two or more courses.

## **10 – Disabilities and other special needs**

Students with learning disabilities should advise the instructor as soon as possible. They should also contact the Office for Students with Disabilities (398-6009, [www.mcgill.ca/osd](http://www.mcgill.ca/osd)). Arrangements can also be made to accommodate special needs such as religion, chronic illness, social discomfort or else.

Students facing personal issues are invited to seek help with McGill's Counselling Service ([www.mcgill.ca/counselling](http://www.mcgill.ca/counselling)). Please note that in order to avoid penalties, it is imperative to inform the instructor of any possible delays as soon as possible.

Additional policies governing academic issues affecting students can be found in the Handbook on Student Rights and Responsibilities, Charter of Students' Rights (regulations can be found online at [www.mcgill.ca/files/secretariat/greenbookenglish.pdf](http://www.mcgill.ca/files/secretariat/greenbookenglish.pdf)).

## **11 – Schedule**

### **Part I**

### **Introduction: Judicial Process, Law, and Politics (Sept. 5, 7)**

#### *Outline:*

This part looks at the role of the Court and law in a broad perspective: what is the place of Courts in our political system. What does this role mean when analysed through the lens of the principle of rule of law? This part is about the way political scientists have approached the study of courts and in what sense the courts are political.

Sept. 5                    **Introduction to the course: course outline, material and requirements**

Readings:                Course outline

Sept. 7                    **Judicial process, law and politics in Canada**

Readings:                HHR, preface & chapter 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]

Further readings:      Morton, 1-8; 31-45

Parliament of Canada, *How Canadian Govern Themselves*, ch. 5: The Rule of Law and the Courts.

**Part II                    The Courts (Sept. 12, 14, 19, 21, 26)**

*Outline:*                    This part of the course will examine: the Canadian judicial system (1), appointment of judges (2), judicial independence (3), its protection (4) and judicial misconduct and discipline (5).

Sept. 12                   **The Canadian Judicial System**

Readings:                HHR, 26-63;

Further readings:      Morton, 93-115;

Supreme Court of Canada webpage: [The Canadian Judicial System](#)

Department of Justice webpage: [Canada's Court system](#) (all sections).

Canadian Judicial Council webpage: [Canada's Court System](#)

Sept. 14                   **Appointment of judges**

Readings:                HHR, 135-171;

Further readings:      Josh Hunter, Padraic Ryan, "The Entrenchment of Discretion: Prospects for Judicial Appointment Reform after a Trio of References" (2016) 74 SCLR: 117-156;

Morton: 117-166;

Lori Hausegger, Troy Riddell, Matthew Henningar, Emmanuelle Richez, "Exploring the Links between Party and Appointment: Canadian Federal Judicial Appointments from 1989 to 2003" (2010) 43:3 *Canadian Journal of Political Science*, 633-659.

Lori Hausegger, Troy Riddell, Mathew Hennigar, "Does Patronage Matter? Connecting Influences on Judicial Appointments with Judicial Decision Making" (2013) 46:3 *Canadian Journal of Political Science*, 665-690;

Ian Peach, "Reference re Supreme Court Act, ss 5 and 6 – *Expanding the Constitution of Canada*" (2014) 23:3 *Constitutional Law Forum* 1-6.

The Role of the Supreme Court of Canada – Membership and the Nomination Process: [webpage of the Library of Parliament](#)

**Sept. 19**                      **Judicial independence**

Readings                      HHR: 173-196;

Further readings:              Morton: 169-174; 183-188; 196-201;

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. [e-reserve],

Martine Valois, "Judicial Independence: Keeping Law at a Distance from Politics" (2013) 60 *The Supreme Court Law Review* 223-245.

**Note:**                              **CONFERENCES START**

**Sept. 21**                      **Protection of judicial independence**

Readings:                      HHR: 196-204;

**Sept. 26**                      **Judicial misconduct and discipline**

Readings                      HHR: 205-209.

Morton: 174-182; 189-195; 201-211;

Further readings:              Barry Cahill, "Removing a Section 96 Judge: An Historical Case Study" (2000) 23 *Dalhousie Law Journal* 233.

Martin L. Friedland, "Judicial Independence and Accountability in Canada" (2001) 59 *Advocate* 859.

**Part III**                              **Actors in Courts (Sept. 28; Oct. 3, 5, 10)**

*Outline*                              This part of the course will examine the question of actors of judicial process. In particular, we will examine the following issues: managing participation in judicial process (1), interest groups intervention in judicial process (2), the role of the government (3).

<b>Sept. 28</b>	<b>Managing participation in judicial process</b>
Readings:	HHR: 64-77;
Further readings:	Brooke Mackenzie, "Trial Lawyers Association of British Columbia and the Supreme Court's use of the Constitution to Protect Public Access to the Courts", (2016), <i>The Supreme Court Law Review</i> , vol. 72, 485-510.
<b>Oct. 3</b>	<b>Interest groups' intervention in judicial process</b>
Readings:	HHR: 211-237;
Further readings:	Howe and Russell, <i>Judicial Power and Canadian Democracy</i> , 214-254. [Reserve, e-book]  Ian Brodie, <i>Friends of the Court: The Privileging of Interest Group Litigants in Canada</i> (Albany: SUNY Press, 2002), chapters 2, 3, 5. [Reserve, e-book]
<b>Oct. 5</b>	<b>Government in judicial process</b>
Readings	HHR: 238-266;
Further readings:	Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law," <i>Queen's Law Journal</i> 31 (2006): 598-643.
<b>Part IV</b>	<b>Types of judicial processes (Oct. 10, 12, 17, 19)</b>
<i>Outline</i>	This part of the class explores the typology of judicial processes, their main features and their policy impacts. We study the criminal justice system (1) and civil justice (2)
<b>Oct. 10</b>	Criminal justice in Canada
Readings	HHR: chap. 9
<b>Oct. 12</b>	<b>Victims in criminal justice</b>
Readings:	HHR: 299-304;
Further readings:	Kent Roach, <i>Due Process and Victims' Rights</i> (Toronto: University of Toronto Press, 1999), ch. 9. [Reserve, e-book].  Lyne Casavant, Christine Morris, Julia Nicol, <i>Bill C-32: An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts</i> , Library of Parliament, No. 41-2-c32-E, 23 July 2014, 41 p.

*Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2

Ontario Federation of Indigenous Friendship Centres, *Response to Bill C-32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, April 2014, 18 p.

**Oct. 17 & 19** Civil justice: access and process  
Readings HHR: chap. 10

**Part V Judicial decision-making (Oct. 24, 31; Nov. 2, 7)**

*Outline* This part of the course is about how courts reach their decisions in particular cases. So we study the determinants of judicial decision-making in general (1-4). In that respect, we will consider the importance of facts at lower courts (1), legal factors (2), subjective and policy considerations (3) and inside or outside influences (4).

**Oct. 24 Facts in decision-making**

Readings HHR: 77-83  
Morton: ch. 8;

Further readings: Mark C. Power, François Larocque, Darius Bossé, “Constitutional Litigation, the Adversarial System and some of its Adverse Effects” (2012) 17:2 *Review of Constitutional Studies* 1-40.

**OCT. 26 MID-TERM**

**Oct. 31 Legal factors in decision-making**

Readings HHR: 111-119  
Further readings Morton: ch. 9

**Nov. 2 Subjective and policy considerations in decision-making**

Readings: HHR: 119-127  
Donald R. Songer, C.L. Ostberg and Matthew Westein, *Law, Ideology and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (Montreal; Ithaca: McGill-Queen’s University Press, 2012), 45-70 [Reserve, e-book]

**Nov. 7**                      **Outside influences in decision-making**

Readings:                      HHR: 127-134

**Part VI**                      **Courts and other powers (Nov. 9, 14, 16, 21)**

*Outline*                      In this part, we see how Courts protect and uphold the royal prerogative on one hand **(1)**, the Parliamentary supremacy on the other hand **(2)** against judicial oversight. We will also specifically see the role they play in the relation between the executive and legislative branches taking as background the debate over the reform of the Senate **(3)** on one hand and the reform of electoral system on the other hand **(4)**.

**Nov. 9**                      **Courts and the executive**

Readings:                      Jarrad Harvey, “‘Old Habits Die Hard’ – Reflections on the Scope of the Royal Prerogative Following *Turp v Canada (Minister of Justice)* (2013) 22:2 *Constitutional Forum*, 13-20.

Eric Adams, “The Constitutionality of Prorogation” (2009) 18:1 *Constitutional Forum*, 17-20.

Noel Cox, “*Black v. Chrétien* and the Control of the Royal Prerogative” (2003) 12:3 *Constitutional Forum*, 94-101.

Erika Chamberlain, “*Abdelrazik*: Tort Liability for Exercise of Prerogative Powers” (2010) 18:3 *Constitutional Forum* 119-128.

Further readings:              Bruce Hicks, “Guiding the Governor General’s Prerogatives: Constitutional Convention Versus an Apolitical Decision Rule” (2009) 18:2 *Constitutional Forum* 55-67;

Paul Daly, “Royal Treatment: The Crown’s Special Status in Administrative Law”, *Review of Constitutional Studies* vol. 22, issue 1, 2017: 81-102.

Paul Daly, “The Policy/Operational Distinction: A View from Administrative Law” (2015), 69 S.C.L.R. 17-40.

Alexander M. Pless, “The Relationship between Crown Liability and Judicial Review: Notes from Quebec” (2015), 69 S.C.L.R. 41-76.

**Nov. 14**                      **Courts and the legislative**

Readings:                      Vanessa MacDonnell, “The New Parliamentary Sovereignty” (2016) 21:1 *Review of Constitutional Studies*, 13-36.



Further readings: Vincent Kazmierski, "Draconian but not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada" (2010) 41:2 *Ottawa Law Review* 245.

Heather MacIvor, "The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege?" (2010) 19:1 *Constitutional Forum* 129-137.

## **Nov. 16 Senate reform**

Readings: Bruce M. Hicks, "Placing Future Senate Reform in Context" (2015) 24:2 *Constitutional Forum* 17-31.

Further readings: [Reference re Senate Reform](#) (Supreme Court of Canada), 2014 SCC 32, April 2014;

Lorraine Snyder, *Reference re Senate Reform (2014): The Supreme Court Clarifies the Senate Reform Process*, [Centre for Constitutional Studies webpage](#).

## **Nov. 21 Courts and the electoral system reform**

Readings: Doug Stoltz, "Fixed Date Elections, Parliamentary Dissolutions and the Court" (2010) *Canadian Parliamentary Review* 15-20.

Rob Leorne, "Keep Democracy out of Court" (2006-07) *Canadian Parliamentary Review* 57-58.

Yaakov M. Roth & Jonathan E. Roth, *Liberals' electoral reform plan is legally futile*, January 18 2016. [Toronto Star](#)

Further readings: Emmett MacFarlane, "Constitutional Constraints on Electoral Reform in Canada: Why Parliament is (Mostly) Free to Implement a New Voting System" (2016) 76 *Supreme Court Law Review*, 399-417.

## **Part VII Powers of courts (Nov. 23; 28)**

### *Outline*

In this part, we examine the involvement of courts in political and highly sensitive and contentious issues where they have been charged of judicial activism. After defining what judicial activism means, we carry out a deeper analysis of its various forms which include striking down government policies or advancing courts' own policies (1) and aggrandizement of institutional role (2).

## **Nov. 23 Courts' interference in policy-making**

Readings: HHR: 339-366.

Further readings: Morton, ch. 10 & 11.

Sanjeev Anand, "The Truth About Canadian Judicial Activism" (2006) 15:2 *Constitutional Forum*, 87-98;

### **CASE COMMENT DUE**

#### **Nov. 28 Institutional aggrandizement of courts**

Readings: HHR: 366-372;

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring Social Change?* 2<sup>nd</sup> ed. (Chicago: University of Chicago Press, 2008), 1-36; 420-429 [RESERVE];

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

Further readings: Morton: ch. 13: 571-598; 617-625.

#### **Part VII Review (Nov. 30)**

##### *Outline*

We review the material seen in this course throughout the fall term in preparation of the final exam as well as tips to be successful in the final.