

DEPARTMENT OF LAW AND LEGAL STUDIES

Winter 2022

Professor Brettel Dawson

COURSE OUTLINE¹

COURSE:	LAWS 5903Y Special Topic Judges and Judging
TERM:	CRN 13608 Winter 2022
PREREQUISITES:	n/a
CLASS:	Delivery Mode ONLINE (SYNCHRONOUS) Note: Some sessions will include video content to be viewed ahead of seminar. Requires reliable, high-speed internet access by computer, with a webcam; and ideally a headset.
Day & Time	Class time: Mondays 11.35AM -2.25PM Instruction is comprised of live Zoom seminars. ² First "Class": January 10, 2022; Last Class: April 04, 2022.
INSTRUCTOR:	Professor T Brettel Dawson
CONTACT:	Office Hrs <u>Thursdays</u> , 11.30AM-1.00PM, or by appointment. Online See Brightspace to confirm and to obtain Zoom ID/Password. Telephone: n/a Email: Brettel.dawson@carleton.ca I will normally reply within 24 hours on weekdays.

DESCRIPTION

This course focuses on judges and decision-making by judges. In the common law system, judicial decisions have 'the force of law'; indeed they are law. As such, they are consequential for the litigants and also for the content of law, and the organization of society. Some settle or unsettle the law. Some spark 'dialogue' between the academy and the legislature. Some spark outrage and galvanize social movements while others inspire and secure social change. Most are unremarkable. All are made through an intensely human process requiring the exercise of judgment, in the absence of meta theory by which they can be measured for correctness. The course will consider how judges make decisions, factors that guide and constrain judges, the extent to which judges make choices when reaching decisions, and the interplay between legal

¹ As of January 6, 2022. Subject to correction. Schedule and Readings may change, with notice.

² These may be recorded (decision pending).

rules, values, and social context. We will also consider whether there is a distinctly judicial state of mind that enhances capacity for good judgment (or, in its absence, poor judgment). The propositions advanced by Sharpe - about authority and legal pedigree, judicial choices, changing social contexts - and his view that judges aspire to make the right or best possible decision, are at once an "insider's view" of how judges make decisions, and a starting point for critical inquiry about that process.

LEARNING OBJECTIVES/OUTCOMES

Though participating in this course, students will be better able to:

1. Interrogate their understandings of judges and judging.
2. Define the nature and scope of the judicial role.
3. Outline how judges engage with (interpret, construct, apply) law, facts and context in decision-making.
4. Critically assess how judges engage with and reconcile two fundamental features of judging: judicial choice and judicial discipline.
5. Articulate features of a distinctly judicial state of mind that enhances capacity for good judgment (or, in its absence, poor judgment).

And, thereby will be able to:

1. Integrate common law (judicial decisions and methods) into their conception of law
2. Engage robustly with judicial decisions in their legal studies research and as citizens.

As a graduate level seminar, I expect you to do the readings, come to class prepared to engage with the topics and themes, and interact collegially with your peers (and me!).

REQUIRED TEXTS

Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018). Readings from this book form the backbone of the course. Please obtain or access a copy of this book.

Available for purchase directly from the University of Toronto Press as an e-book or print book \$32.95 as of writing at: <https://utorontopress.com/9781487522438/good-judgment/>

[Also available in the Carleton University library as an e-book.]

I will assign additional academic articles and cases each topic from which we can critique, expand and/or apply ideas raised by Sharpe. See course schedule.

For each of Weeks 3-10, two students will be assigned to formulate questions for discussion and facilitate our examination of the readings, topic, and themes. See Appendix: Course Flow Evaluation Details.

Note: I will identify various media relevant to some topics (e.g., documentaries; live or prepared zoom interviews; imagery related to judges). As we are meeting by Zoom, it will be necessary for you to watch this content before class. I will also identify 'related readings' which may provide background or an additional sources – these are not assigned as such.

SUPPLEMENTARY TEXTS

E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge: Cambridge University Press, 2005).

[Available in the Carleton University library as an e-book.]

The legislative framework applicable to judges in Canada are given in **Appendix 1**. We may refer to various of these items in topics.

EVALUATION

See the **Appendix 2** for details, requirements, and due dates.

Participation/Engagement Related. 50% of final grade.

- [12%] Weekly seminar attendance and participation/engagement as expected at the graduate level. Attend all classes and get a 2 mark bonus!
- [16%] Lead discussion for your assigned week; prepare and post in advance three Discussion Questions on readings.
- [12%] Make written responses to three discussion questions posed by other students (DQs other than your own!). (3 responses, 4 marks per response).
- [10%] Constructive, written, Peer Feedback on two Research Outlines of other course members.

Research Paper: Preparatory, Presentation and Paper 50% of final grade.

Research paper on an aspect of judging and judicial decision-making (paper topic to correlate with themes, topics in the course) with the following graded steps include:

- [Pass/Fail] Select research topic; prepare preliminary research abstract.
- [10%] Research Outline: prepare a detailed research plan for your essay.
- [10%] Present/discuss your work in progress Research Essay either Week 11 or Week 12.
- [30%] Final Research paper (approx. 18-20 pages or 4500-5000 words max) Due on or before April 19, 2022.

Extensions, Late Work

You must attend and participate on the weeks where you are facilitating discussion or presenting your work in progress. If a problem comes up be in touch with me as soon as possible to see if alternative time slots can be sorted out. Best to use the **Extension Form** posted on Brightspace in the first instance.

For all written work, there is a "grace day" policy (3 days over the semester) to provide you with some flexibility during our COVID-disrupted lives. No need to give a reason, just send me the Form. Note, that some deadlines affect your peers ability to do their work.

My general policy is that late work or absences related to participation, presentations and written work without approval/deferral receive ZERO marks. This policy is designed to ensure that you stay in close contact with me so we can solve any problems affecting your course work timelines together. At the graduate level, I expect you to take responsibility for your progress in

the course. Good standing in the MA in Legal Studies anticipates work of a B+ standard or higher. All written components must be completed to get a passing grade in the course.

Note: Medical notes are not normally required for extensions of less than one week. They do not in any case replace or supersede completion of the Extension Request Form. Extensions for longer than 7 days will normally not be granted. In extraordinary cases where extensions lasting longer than 7 days are requested, you will be required to provide additional information to justify the longer extension (up to a maximum of 14 days).

You may, if you wish, complete the [self-declaration form](#) available on the Registrar's Office website to request academic accommodation for missed course work including exams and assignments. Students are also encouraged to connect directly with me to discuss required accommodations arising from the COVID-19 situation.

Note: Standing in a course is determined by the course instructor subject to the approval of the Department and of the Faculty Dean. This means that grades submitted by the instructor may be subject to revision. No grades are final until they have been approved by the Department and the Dean. Other University and Departmental Course Policies are set out in **Appendix 3**.

TOPICS AND READINGS

OVERVIEW

Our course topics as set out in the Schedule, fall into three main groupings:

- A) Judges: The 'who and what' of judging.
- B) Judicial Decision-making; and
- C) Context and Narrative in Judging.

Themes recur between these sections and topics - and some material/readings will be relevant across several topics. I've designed the course in layers through which we will deepen our encounter with judges and judging as we progress.

I have identified core readings each week and some that provide more depth. I do not expect a super close reading of all core readings or cases (don't be overwhelmed!) Instead, identify and focus in on the aspects that are pertinent to our topic of the day and which spark your interest.

Where cases are given, you should at least browse them. I've chosen cases that are referred to/used in the core readings. Reading cases may be unfamiliar as to form and lexicon, even how they establish authority and meaning. We can chew them over in class.

Equally, I don't anticipate that we will discuss all of the readings either. I've designated 'core readings' each week as a start or minimum.

Each week two students will be assigned/responsible for preparing discussion questions ahead of time and facilitating our class discussion. In this way, we will operate as a seminar for engaged discussion.

Where we have a guest, they will normally be with us for the first hour of class time.

SCHEDULE

A) JUDGES: THE 'WHO AND WHAT' OF JUDGING

Topic 1 Jan 10	Introduction: Judges, Pathways and Portraits
Scope	<p>Introduction to concepts and themes; explore what we know or think about judges and judging; judicial decisions as law/framing of legality. (Our) images of judges, 'picture of judges'; questions for inquiry about judging. What/why it is worth studying judges and judicial decision-making.</p> <p>Per Leslie J Moran, in <i>Law Judges and Visual Culture</i> (New York: Routledge, 2021):</p> <p style="padding-left: 40px;">...how the institution of the judiciary is formed and reproduced and how it engages with the community it serves" "meaning making. Publicity (regulatory) and educational (court room as school of justice". Public face of authority symbolism – of office; temples of justice (spaces, places, buildings' and costume (performance).</p>
Core Readings	<p>Agata Fijalkowski, "[Review] Law, Judges and Visual Culture: Leslie J. Moran." (2021) 15 <i>Law and Humanities</i> 2021: 300–305.</p> <p>Sharpe, <i>Good Judgment</i>, Ch 1, pp 3-18.</p>
Depth Readings	<p>Nikki Godden-Rasul, "Portraits of women of the law: re-envisioning gender, law and the legal professions in law schools" (2019) 39:3 <i>Legal Studies</i> 415-431. Link to exhibition of women in law at Home iwlaw.</p>
Video WATCH BEFORE CLASS	<p>[15 mins] Outgoing Supreme Court Justice Rosalie Abella on family and learning to be a judge CBC Radio (scroll to video link (conversation with Rosemary Bartlett).</p> <p>[3 mins] Albie Sachs: 21 Icons : Albie Sachs : Short Film - YouTube (short bio/portrait – put this in week 1</p>
Related but not 'assigned'	<p>[30 mins] A Home for Justice - touring South Africa's Constitutional Court with Albie Sachs - YouTube URL: https://www.youtube.com/watch?v=Oh7RwZjbakg</p>

	<p>Paul Wells, "Rosie Abella said she'd answer questions when she turned 75" MacLeans (June 2021); Rosie Abella said she'd answer questions when she turned 75 - Macleans.ca URL: https://www.macleans.ca/news/rosie-abella-said-she-d-answer-questions-when-she-turned-75/</p> <p>[40 mins] Madame Justice Steps Down The Agenda - YouTube URL: https://www.youtube.com/watch?v=ZcOdwk6ydRs</p>
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Topic 2 January 17	What Judges Do: Function, Work, and Judicial Education
Scope	What is it to be a judge ("to be a judge is to decide")? Institutional and ethical boundaries; independence, impartiality. How do judges see judging? What is the function of judges? What is the work of judges? How does this work differ by court (trial, appellate, apex court)? How do judges learn to be judges? Introduction to judicial education in Canada.
Core Readings	<p>Sharpe, Chapter 2 at 27-52.</p> <p>Christian Sebastien et al, "How Judges Learn to Be Judges" in <i>Judicial Education, Proceedings of the First and Second International Colloquium of the Chilean Judicial Academy</i> (Santiago, Chile: DER Editions, 2019) at 381-414.</p> <p>T Brettel Dawson, Kate Kehoe and George Thomson, "Marc Rosenberg: Judicial Education Leader" in <i>To Ensure Justice is Done: Essays in Memory of Marc Rosenberg</i> (Toronto: Thomson Reuters, 2017) at 279</p>
Judicial Document	<p><i>Ethical Principles for Canadian Judges</i> (2021): online at: https://cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual_Final.pdf.</p> <p>Ethical Principles for provincially appointed judges (Ontario) are online at: Principles of Judicial Office Ontario Court of Justice (ontariocourts.ca)</p>
Depth Readings	<p>Richard Devlin, "From Archetypes to Architects: Re-envisioning the Role Morality of Trial Level Judges" (2011) 43 <i>University of British Columbia Law Review</i> 277.</p> <p>Brian Dickson, "A Life in the Law: The Process of Judging" (2000), 63 <i>Sask. L. Rev.</i> 373-388.</p> <p>H. Levitt & Dunnavant, "Judicial Wisdom: The Process of Constructing Wise Decisions." (2015) <i>Journal of Constructivist Psychology</i> 243-263.</p>
Guest	

Related but not assigned	<p>Court Structure Canada: online at https://www.justice.gc.ca/eng/csjsjc/just/07.html</p> <p>Remarks by Chief Justice of Canada, "Ethical Principles and Cultural Competence: A Duty to Learn (May 6, 2021): Online at https://www.scc-csc.ca/judges-juges/spe-dis/rw-2021-05-06-eng.aspx (May 6, 2021).</p> <p>National Judicial Institute URL: https://www.nji-inm.ca/index.cfm/about/about-the-nji/</p> <p>T. Brettel Dawson and Natalie Williams, "Innovations in Judicial Education: Preventing Wrongful Convictions" (2013) 1 Judicial Education and Training 59-68, <online at: ></p>
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Topic 3 January 24	Judges: Getting There
Scope	Judicial appointments; composition of the Canadian judiciary); criteria & process; diversity of judiciary.
Core Readings	<p>Sharpe, Chapter 2 at 18-26</p> <p>Devlin, Richard, and Adam Dodek. "The Achilles Heel of the Canadian Judiciary: The Ethics of Judicial Appointments in Canada." Legal ethics (Oxford, England) 20.1 (2017): 43–63. Web. 000</p> <p>Avner Levin & Asher Alkoby (2019) Shouldn't the bench be a mirror? The diversity of the Canadian judiciary, International Journal of the Legal Profession, 26:1, 69-88, DOI: 10.1080/09695958.2018.1489818.</p> <p>Statistics Judicial Applicants and Appointees: OCFJA: Statistics regarding Judicial Applicants and Appointees (October 29, 2019 – October 28, 2020) (fja-cmf.gc.ca)</p>
Judicial Documents	<p>Review appointments process (see Appendix 1: Legislative Framework.</p> <p>And see: Assessment Criteria: Office of the Commissioner for Federal Judicial Affairs Canada - Guidelines (fja-cmf.gc.ca) URL: https://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#AppendixA</p>
Depth Readings	<p>Agathon Fric, "Popping the Question: What the Questionnaire for Federal Judicial Appointments Reveals about the Pursuit of Justice, Diversity, and the Commitment to Transparency" (2020) 43 Dalhousie L.J. 159.</p> <p>Questionnaire to be completed by applicants: Superior Courts: current August 2021 (PDF).</p>
Guest	

Related but not assigned	Samreen Beg & and Sossin, Lorne, Diversity, Transparency & Inclusion in Canada's Judiciary (January 27, 2017). Debating Judicial Appointments in an Age of Diversity, Routledge, 2017. Available at SSRN: https://ssrn.com/abstract=2906870 in Graham Gee and Erika Rackley, eds. <i>Debating judicial appointments in an age of diversity</i> . (New York: Routledge, Taylor & Francis Group, 2018) ch 7 at 118-141.
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B) JUDICIAL DECISION-MAKING

Topic: 4 January 31	Judges and the Law I: (Un)certainity, (In)determinacy, and Making Law
Scope	Nature and extent of uncertainty in the law; scope of certainty and judicial choice; approaches of formalism v contextualism; indeterminacy in theory and practice (e.g., critical legal studies and legal realism). Sharpe asks "where does that leave me as a judge?" (at 67). Reaching "right" results. Context as an element of decision-making. Judicial law-making as "inherent, inevitable, and desirable".
Core Readings	Sharpe, Ch 3, 53- Is the Law Uncertain? & Ch 5, 77 - Do Judges Make Law? E.W. Thomas, "The Judicial Process and How Judges Think" (2009) 1 New Zealand Law Review 1-26 esp. 2-10 Michael Kirby, "Beyond Judicial Fairy Tales" (2002) Quadrant (January-February) 26-33.
Depth Readings	David Kairys, "Law and Politics" (1984) 52:2 Geo Wash L Rev 243 esp 243-250 [useful to situate Sharpe's discussion].
Case(s)	These cases are discussed by Sharpe and are worth reading as ways to apply the ideas and points explored by Sharpe: <i>Reference re meaning of the word "Persons" in s. 24 of British North America Act</i> , (1927), [1928] S.C.R. 276 [Supreme Court of Canada]; <i>Edwards v Attorney General of Canada</i> , 1929 [1930] 1 DLR 98 [Judicial Committee of the Privy Council, UK] – <ul style="list-style-type: none"> In browsing these cases, look for the contrast in judicial approaches to interpretation of the BNA and stance in relation to precedent cases; compare 'originalism' of the Supreme Court of Canada with contextualism of JCPC. <i>R. v. N.S.</i> , 2010 ONCA 670 (CanLII), online at < https://canlii.ca/t/2cx09 > [Ontario Court of Appeal]; 2012 SCC 72 (CanLII), [2012] 3 SCR 726 online at: < https://canlii.ca/t/fvbr > [Supreme Court of Canada] <ul style="list-style-type: none"> We are likely to refer to this case in several topics so it's worth reading at this point.

Background Video optional /watch ahead]	Did you Know: The Famous Five and the Persons case: URL: https://www.youtube.com/watch?v=if_pyx5dm9Y
Related but not assigned	E.W Thomas, <i>The Judicial Process</i> at 115-138. John Hasnas, "Back to the Future: From Critical Legal Studies Forward to Legal Realism, Or How Not to Miss the Point of the Indeterminacy Argument" (1995-1996) 45 Duke L.J. 84.

Topic 5 February 7	Judges and the Law II: Rules, Principles, Policies, Normative Visions
Scope	Norms or standards with which judges work; how they relate to each other; how used to "create a rational and coherent scheme of law"; the 'principled approach' in Canada compared to 'specific rules.' Case study application.
Core Readings	Sharpe, Ch 5 - Rules, Principles, and Policies & Ch 9 - Judicial Decision-Making Case Study (Jones v Tsige) Devlin, The Art and Craft of Judicial Decision-Making: An Essay for Justice Marc Rosenberg" in <i>To Ensure Justice is Done: Essays in Memory of Justice Marc Rosenberg</i> (Toronto: Thomson-Reuters, 2017) at 279-
Case(s)	<i>Jones v. Tsige</i> , 2011 ONSC 1475 (CanLII), < https://canlii.ca/t/fkppt >, Also relevant: <i>R v NS (Niqab)</i> See Topic 4.
Guest	
Related	EW Thomas (NZLR) Esp 11; 15 See Topic 4

Topic 6 February 14	Judges and the Facts: Narratives I [Indigenous]
Scope	Deciding 'what happened' is a core function of trial judges through hearing witness testimony. Judges determine whether contested evidence is admissible or not. They make 'findings of fact' (often involving findings of credibility) as many (often conflicting or irreconcilable) stories are brought before them. They must give reasons to support their conclusions. In the process of hearing, sifting and sorting evidence before them, judges shape a narrative of the case. This has been described to me as "the most challenging part of the work of a judge", involving "a large measure of discretion and good judgment, and the application of experience and common sense." In this Topic, we take up the idea of 'narrative' construction by judges in fact finding and evidence with a focus on Indigenous legal orders and evidence.

Core Readings	Lance Finch, "The Duty to Learn, Taking Account of Indigenous Legal Orders in Practice" (2012) online at: P-253: The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice (gouv.qc.ca) EW Thomas, <i>The Judicial Process</i> , "the all important facts" at 320-327. Emma Cunliffe, <i>Notes on Evidence and Fact Finding</i> (2011).
Depth Readings	Hon. Lynn Smith, "The Ring of Truth, the Clang of Lies: Assessing Credibility in the Courtroom." (2012) 63 <i>University of New Brunswick Law Journal</i> 10.
Case(s)	<i>Restoule v Canada</i> (Attorney General), 2018 ONSC 7701, online at https://canlii.ca/t/hwqxg
Case Background	To get a quick introduction to this litigation, see: Tanya Talaga, "First Nations challenges 1850 treaty in court" <i>Toronto Star</i> , 09 Sep 2014: A.10. 000 Darcy Lindberg, Historical lawsuit affirms Indigenous laws on par with Canada's, 16 Jan 2019. 000 online at <i>The Conversation</i> : Historical lawsuit affirms Indigenous laws on par with Canada's (theconversation.com)
Guest	
Video/Web	This site gathers material related to all stages of the Robinson Huron Treaty litigation to date: Litigation RHT1850 (robinsonhuron treaty1850.com)
Related but not assigned	Evan Bell, "An Introduction to Judicial Fact-Finding" (2013) 39:3 <i>Commonwealth Law Bulletin</i> 519

[Reading week – No class February 21]

Topic 7 February 28	Judges and the Law III: Parameters and Constraints
Scope	Judicial method (practical); search for authority (arguments with sufficient legal pedigree); boundaries of decision-making; discipline of reasons; discovery and justification; audience and accountability. Discretion. Judicial choice. Constraints (internal and external) on judicial decision-making. judicial icons/iconoclasts.
Core Readings	Sharpe, <i>Good Judgment</i> , chapters 6 - Disciplined Decision-Making & Chapter 8 - Authority: What Counts? Albie Sachs, "Tick Tock: The Working of the Judicial Mind" in <i>The Strange Alchemy of Life and Law</i> (Oxford, OUP, 2009) at 47.

	EW Thomas, NZLR (see Topic 4) at 16-22
Video [Watch ahead of class]	Transitional Law Institute. Kings College London, TLSI Keynote 2016: Judge Albie Sachs - YouTube [58 mins]URL: https://www.youtube.com/watch?v=3wXStTN_YkM
Related reading but not assigned	EW Thomas, <i>Judicial Process</i> at Ch 10, Constraints on the Judiciary

C) CONTEXT AND NARRATIVE IN JUDGING

Topic 8 March 7	Judging, Sexual Assault and Judicial Education
Scope	High profile sexual assault trials (with acquittals) have touched a deep nerve among women and allies at a moment where ‘celebrity’ impunity and sexual predation has been ‘outed’ (e.g., the #metoo movement). Equally high profile inquiries by the Canadian Judicial Council have been held into judicial misconduct in sexual assault cases (e.g., Justice Robin Camp, the “knees together” judge). The ‘social conclusion’ was that judges in Canada were falling short in sexual assault cases. A Member of Parliament (Rona Ambrose) introduced Bill C-337 (2017) to amend the Judges Act and require education (training) on sexual assault for judges. An amended Bill (C-5/C-3) was reintroduced in 2020 and passed into law on May 6, 2021. Will sexual-assault educated judges make a difference?
Core Readings	Parliament of Canada, Bills C-337 (2017) & C-3 (2021), amending the <i>Judges Act</i> . Rosemary Cairns-Way & Donna Martinson, "Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada" (2019) 97:2 Can B Rev 367 Briefs on Bill C-3 to House of Commons Justice Committee including <ul style="list-style-type: none"> • Dawson and • National Association of Women and the Law (NAWL)
Depth Readings	Report of the Canadian Judicial Council (Justice Robin Camp) (2016) Janine Benedet, "Judicial Misconduct in the Sexual Assault Trial" (2019) 52 U.B.C. L. Rev. 1-56 Transcripts (selected) Hearings before House of Commons Justice Committee (Bill C-337) and Bill C-3).
Judicial Documents Appendix 1	Ethics Principles Conduct – Complaint Processes
Guest	

Web	Canadian Judicial Council online at Home Canadian Judicial Council (cjc-ccm.ca) ; URL: https://cjc-ccm.ca/en at https://cjc-ccm.ca/en/what-we-do/professional-development
Related but not assigned	Anne Kingston "Marie Henein defends herself," MacLeans Magazine. March 30 2016 Online at: Marie Henein defends herself (macleans.ca) . URL: https://www.macleans.ca/society/marie-henein-defends-herself/

Topic 8 March 14	Judging and Gender (Narratives II)
Scope	<p>Given the working thesis that a more diversified judiciary is necessary, and working with the view expressed by Thomas that "law is not an end in itself but a social institution that exists to serve the needs and expectations of society" (at 14), what difference legitimately follows from appointing women, racialized, LGBTQ+ persons or other communities? What do they bring with them to the bench and judicial decision-making? How is social context and contextualism relevant in judicial reasoning?</p> <p>This week we take up gender and Judging. Next week we take up race and judging.</p>
Core Readings	<p>Rosemary Hunter. "More Than Just a Different Face? Judicial Diversity and Decision-Making." (2015) 68 Current Legal Problems 119–141.</p> <p>Martha Gayoye, Why Women Judges Really Matter: The Impact of Women Judges on Property Law Outcomes in Kenya (2022) 31 Social & Legal Studies 72-98</p>
Depth Readings	Bertha Wilson, "Will Women Judges Make a Difference" (1990) 28 Osgoode Hall Law Journal 507-522
Case(s)	<i>Lavallee and Morgentaler</i> (Extracts Wilson J)
Related Reading but not assigned	<p>Ulrick Schultz & Gisela Shaw, <i>Gender and Judging</i> (London: Bloomsbury, 2013).</p> <p>International Association of Women Judges: Judicial Education Project, online at: Jurisprudence of Equality Programs - International Association of Women Judges (iawj.org)</p> <p>Margaret Thornton & Heather Roberts, "Women Judges, Private Lives: (In)visibilities in Fact and Fiction" (2017) 40 University of New South Wales Law Journal 761-777.</p> <p>Réaume, D., 2018. <i>Turning Feminist Judgments into Jurisprudence: The Women's Court of Canada on Substantive Equality</i>. Oñati Socio-legal Series [online], 8 (9), 1307-1324. Available from: / Disponible en: http://ssrn.com/abstract=3215739</p>

Topic 10 March 21	Judging and Race (Narratives III)
Scope	<p>The <i>RDS</i> case frames our topic this week. At its heart were narratives of impartiality in judging and racism in society (and policing). Although decided in 1997, it continues to resonate in law and discourse. In their joint decision in the case, Chief Justice MacLachlin & Justice L'Heureux Dubé stated: "We conclude that the reasonable person... is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality." (at 509, line 48). There was a minority, concurring view. Their judicial colleagues were much less effusive on this point.</p> <p>As our material this week makes clear, the construction of impartiality with respect to race and racialization remains a live issue in judging.</p>
Core Readings	<p>Sharpe, Chapter 12 – A Judicial State of Mind.</p> <p>James W. St. G. Walker, "A Black Day in Court: "Race" and Judging in <i>R. v. R.D.S.</i>", Chapter 11 in <i>The African Canadian Legal Odyssey</i> (Toronto: Osgoode Society for Legal History and University of Toronto Press, 2012) at 437-480. (online at Carleton Library); https://doi.org/10.3138/9781442666801-013</p> <p>Constance Backhouse, "Turning the Tables on RDS: Racially Revealing Questions Asked by White Judges" (2021) 44:1 Dal LJ 181.</p>
Depth Readings	Xavier, Sujith, Biased Impartiality: A Survey of Post-RDS Caselaw on Bias, Race and Indigeneity (January 8, 2021). Forthcoming 99:2/3 Canadian Bar Review.
Case(s)	<i>R. v. S. (R.D.)</i> [1997] 3 S.C.R. 484 [RDS]
Video [Watch ahead of class]	2020 Weldon Award for Unselfish Public Service The Honourable Corrine E. Sparks [5.45] https://www.youtube.com/watch?v=AKViVplwfTw
Web	<p>Judge Corrine Sparks named 2020 Recipient of the Weldon Award for Unselfish Public Service - Schulich School of Law - Dalhousie University</p> <p>URL: https://www.dal.ca/faculty/law/news-events/news/2020/11/02/judge_corrine_sparks_named_2020_recipient_of_weldon_award_for_unselfish_public_service.html</p>
Related	Smith, <i>The Clang of Truth</i> , see <i>infra</i>

Weeks 11 and 12 are “Judging Symposium” [March 28 and April 04, 2022]

Our last two weeks take the form of a Symposium of work in progress (your draft research papers) on aspects of judging and judicial making. Thereafter, you will finalize the research paper for delivery (to me).

Note: This course addresses only one of several ways that judges and judicial decision-making may be studied. The design of the course reflects my own experience, interest, and expertise arising from working directly with judges over many years. We can range widely within it, especially as this is an initial offering in the field through the Special Topics space.

Perhaps unnecessary to say, but in terms of your expectations, please note that the course does not attempt a sociology of judging. We will explore some theoretical frameworks, but my working assumption is that these are emergent. I have also chosen not to address, except in passing, constitutional decision-making (judges in a democracy) or the US Supreme Court. That gets headlines! I've chosen to focus on the 'normal', everyday work of judges in Canada. The course does not cover sentencing or juries (although these are important parts of the work of a judge in criminal law matters). We will not be dissecting the trial process itself or the roles of judges and lawyers more generally within trials. We will not address decision-making by Tribunals or in arbitration settings. Also sadly consigned to different course is judging in specialized courts (e.g., Drug Treatment or “Gladue” Courts; or international courts). We will also bypass judicial settlement conferencing and case management. Finally, I recognize the pressing urgency of access to justice issues in Canada but could not include them in this course.

APPENDIX 1: LEGISLATIVE FRAMEWORK CANADIAN JUDICIARY

The following are some of the pertinent statutes (legislation) that affect judges in Canada and other foundational documents addressing judicial ethics and judicial conduct (complaints). We will refer to (examine) various of these items as relevant to topics we are covering in the course. They are gathered here for convenience.

Administration

Judges Act, RSC 1985, c. J-1. <online at [Judges Act \(justice.gc.ca\)](https://laws-lois.justice.gc.ca/eng/acts/J-1/FullText.html) URL: <https://laws-lois.justice.gc.ca/eng/acts/J-1/FullText.html> and Act to Amend the Judges Act, SC 2021 c. 8

Courts of Justice Act, R.S.O. 1990, c. C.43 (Ontario). <online at [Courts of Justice Act, R.S.O. 1990, c. C.43 \(ontario.ca\)](https://www.ontario.ca/laws/statute/90c43). URL: <https://www.ontario.ca/laws/statute/90c43>.

Appointment

Ontario Provincial Court:

[Judicial Appointments Advisory Committee | Ontario Court of Justice \(ontariocourts.ca\)](https://www.ontariocourts.ca/ocj/jaac/) ;
URL: <https://www.ontariocourts.ca/ocj/jaac/>

Superior Courts (federal appointments):

OCFJA: [Federal Judicial Appointments - Introduction \(fja-cmf.gc.ca\)](https://www.fja-cmf.gc.ca)
URL: <https://www.fja-cmf.gc.ca/appointments-nominations/index-eng.html>

Supreme Court of Canada: <https://pm.gc.ca/en/news/news-releases/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial>

Ethical Principles

Ethical Principles for Canadian Judges (2021) <online at [Ethical Principles for Judges / Principes de déontologie judiciaire \(cjc-ccm.ca\)](https://www.cjc-ccm.ca)>.

We look at these Principles in Week 2 but they are relevant throughout the course. They build our 'picture' of judging and judges.

Ethical Principles for provincially appointed judges (Ontario) are online at: [Principles of Judicial Office | Ontario Court of Justice \(ontariocourts.ca\)](https://www.ontariocourts.ca)

Judicial Conduct - Complaints Process

Ontario: Ontario Judicial Council –

Judicial Conduct: online at <https://www.ontariocourts.ca/ocj/ojc/public-hearings-decisions/>

Superior and Appellate Courts

Judicial Conduct: Reforming the Complaints Process (December 2021). URL: <https://www.justice.gc.ca/eng/csjs-jc/pl/jc-cj/index.html>

Bill C-9 An Act to Amend the Judges Act (Dec 16, 2021). URL: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-9/first-reading>
Canadian Judicial Council, Open Letter to Canadians URL: <https://cjc-ccm.ca/en/news/open-letter-canadians-canadian-judicial-council-0>

Info graphic (comparing current and reformed process, URL: <https://www.justice.gc.ca/eng/csj-sjc/pl/jc-cj/infographic-infographique.html>

APPENDIX 2: EVALUATION

Evaluation is comprised of the components identified in the Outline. This Appendix sets out (binding) **details, expectations, and due dates**.³ This is the 'authoritative' version. I've tried to make this fulsome but if you need clarification, please be in touch.

Brightspace Grade Book has been set up to reflect these components.

COMPONENTS

Participation/Engagement Related. [50% of final grade].

[12%] Weekly seminar attendance and participation/engagement (as expected at the graduate level; weeks you are not leading/presenting (on the basis that you are being assessed separately for those classes); allows for absences from two classes with advance notice. Bonus of 2 marks if you attend all classes! **Grading: 8 classes x 1.5 marks each.⁴ Total 12 marks.**

You are expected to participate thoughtfully in the discussions through posing questions, offering examples, sharing relevant experiences, active listening, and critically analyzing the course materials and your own positions. Effective participation is premised upon completing the assigned readings every week, being prepared to discuss them in an informed manner, making constructive interventions to facilitate the production of group knowledge, and listening to colleagues with attention and respect.

I expect you to have read all of the core readings every week in a careful manner that enables your informed and engaged participation in each class. Lateness, low participation and/or absence without a legitimate reason (ideally communicated in advance) will have an impact your participation grade.

[16%] Facilitate discussion for ONE assigned week; prepare and POST in advance three Discussion Questions on core readings.

Grading: Questions: 6 marks + Facilitation of class discussion, 10 marks. Total 16 marks.

Each week, two students will be responsible for each preparing three Discussion Questions to animate a critical intellectual discussion of the core readings on weeks 3-10. Students do not need to collaborate or coordinate on their questions. You may wish to divide up the readings between you. Student facilitators use their questions to facilitate class discussion of the material of the Week.

Questions need to be uploaded to the Discussion Forum on the applicable week on Brightspace **by 6.00PM Friday** prior to your assigned week. Everyone should read the questions before coming to class

Dates will be assigned by (almost) random draw after the first class. Please let me know on or before the first class if there is a particular week where you will not be able to prepare question or if you particularly want one topic/week.

³ I want to acknowledge the assistance and inspiration for this evaluation schema of Professor Sheryl Hamilton (LAWS 5662). Some of my text is taken directly from this source!

⁴ Semester: 12 weeks. Facilitating or Presenting: 2 weeks (which you attend, obviously!) Of remaining 10 weeks, working assumption is that you will be present for at least eight.

Discussion Questions should take the following form:

1. A close reading question: One question which selects a specific challenging or intriguing passage from one of the readings and offers a series of probes to unpack, trouble, engage, elaborate upon, etc. that author's point. This can be a passage with which you are confused, annoyed, stimulated, thrilled, etc. but should be complex enough to warrant our specific attention.
2. A theoretically or conceptually focused question: One question which draws connections between themes across readings for the week (and to earlier weeks' readings or even other courses) and what may be 'emerging' in terms of how judges explain their work/how scholars engage/critique it.
3. An application question: One question which selects an instance of judging (or case example) to elaborate upon the topic/concept upon which that week's materials are focused to help us work through issues and explore application of some ideas, critiques etc.

Please keep in mind that the primary goal of the questions is to simulate a rigorous and critical discussion of the readings and the issues they are exploring. Questions should seek to elicit analysis, not opinion or belief. To this end, they should not be answerable by "yes" or "no," "good or bad," or "loved it or hated it." The objective of this component of the evaluation is to showcase your ability to read critically, to make connections to other ideas and consider the province of judging.

This is not an exercise in describing the readings. All questions should begin from the premise that all members of the class have read the readings carefully and are ready to discuss them at a high level. At the same time, once a question begins to resemble a small book, it becomes very challenging to answer. Please keep that in mind. If your questions exceed more than 6 or 7 sentences, you likely want to revisit them.

[12%] Make written responses to discussion questions in weeks other than your own (3 responses). **Grading: 4 marks per question answer. Total of 12 marks.**

Over the semester, select three questions - one close reading question, one conceptual question and one application question - as posed by your classmates in their DQ week (a total of three answers). Prepare a written answer of no more than 500 words (about 2 pages) to each question selected. You cannot select a question from 'your week' and you can only select one question from any week Submit each answer to Brightspace Forum.

You may submit your written responses at any time until the cut off (April 10, 2022 at 11.59PM). However. I recommend you prepare your answers as we go through the term while the material is fresh in your memory.

[10%] Constructive, written, Peer Feedback on two Research Outlines by other course members.
Grading 5 marks for each set of feedback. Total of 10 marks.

Everyone in the class must prepare a research proposal for their research essay. Your proposal will be provided [by random draw] to two other students in the course who will be responsible for providing you with constructive feedback on your proposal.

I will provide a short guide to aid you in providing constructive feedback.

This feedback should be completed and sent directly to your colleague (with a copy to me) **within 10 days** of being assigned to provide feedback. **No later than March 21, 2022.**

A. **Research Paper: Preparatory, Presentation and Paper [50% of final grade].**

Select a topic or issue or aspect of judging and judicial decision-making that you find interesting and which raises questions which want to 'excavate' to better understand/engage in scholarly analysis. I will post a document with Essay Topic Suggestions. The following scaffolded assignments are designed to help you through this process as smoothly as possible!

When preparing your paper (and researching through sources), I encourage you to try out a Zettelkasten method.⁵

[Pass/Fail] **Research Abstract** (Pitch): Select research topic (correlated with themes, topics in the course); prepare a preliminary research abstract, identifying the subject area and academic question(s) to be taken up; how you plan to study/research the question(s); (tentatively) how you plan to approach/analyze the research question (theory/conceptual lens). Include a statement of what makes this interesting for you. **Pass/Fail**

About 300 words (a little over a page) detailing your topic for your final paper. While graded 'pass/fail' this will allow me to give you early feedback.

Due: February 01 by 11.59PM.

Submit to me by email on or before February. I'll get back to you as soon as I can!

⁵ See e.g., <https://leananki.com/zettelkasten-method-smart-notes/>. In essence, this method divides your notetaking into two steps. The first is our usual process of highlighting, pulling out quotes etc. The second, Zettelkasten, step is to take a 'smart note' on each thing you read and 'code' the smart note to a sub-topic in your research (giving short form of source). In each smart note, you write in your own words the key ideas that have come to you from reading the piece. You then file each smart note by 'code'/applicable sub-topic. The benefit is that you'll be able to see how your research is adding up and, when it's time to write, you will have already made a start on the content. This also assumes that you keep a document with complete bibliographic information on your sources so that you can use a short form of author/source on your notes. There are now a lot of programs coming out dedicated to Zettelkasten (Roam Research, Obsidian etc) but you can use/experiment with this system of writing notes (by hand or on your computer). If it works for you, you may gain a super-power!

[10%] **Research Outline:** building from the abstract (after feedback) and further consideration and elaborating on/finalizing focus, research components and approach (theoretical/conceptual). From this process prepare a detailed research outline including the research question (and sub-questions) animating your work; the sections of your essay (and purpose of each section). This is similar to preparing a Research Proposal but a little less formal for this context. Include a bibliography in correct citation style (you can select your preferred style). You will get feedback on this Outline from two of your peers. Keep working on your research before receiving this feedback (i.e., Don't wait to get feedback!) **Total of 10 marks.**

Due: **March 07** (Peer feedback due on or before March 21). You should be able to complete this task in about 5 or 6 pages (1250-1500 words).

[10%] **Presentation of Research in Progress** (Symposium Style) of your draft final research paper with discussion (allocated to one of Week 11 (March 28) or Week 12 April 04) . You will be graded on your presentation and engagement with discussion. **Total of 10 marks.**

Presentations Weeks of March 31 and April 07. Drawn by (mostly) random draw (let me know if there is a reason why one of these weeks is better for you than the other.)

Prepare a 5-10 minute presentation (time yourself). No PowerPoint. Anticipate 5-10 minutes of comments and questions to which you can respond.

[30%] **Final paper** (approx. 18-20 pages or 4500-5000 words max.

Due: on or before April 19, 2022.

Submit to the Research Paper Assignment on Brightspace. Submit in WORD or as a PDF. Not in Pages!

Prepare your paper in standard format (normal margins, double-spaced, font 12pt (Arial, Calibri or Times New Roman); indented paragraphs (or space between paragraphs).

Adopt and follow a recognized citation style throughout your paper. Be certain to attribute all your sources for quotes and any paraphrasing using the style you have adopted (e.g, footnotes, endnotes, in text). Quotes over 50 words are to be indented.

Include a bibliography. I'll be anticipating around 20 relevant sources, used in your paper (not just a list of other literature in the field).

Include a cover page with your title (make it informative – linked to your central claim in the paper; give your name and student number.

APPENDIX 3: UNIVERSITY AND DEPARTMENTAL COURSE POLICIES

PLAGIARISM

Plagiarism is presenting, whether intentional or not, the ideas, expression of ideas or work of others as one's own. Plagiarism includes reproducing or paraphrasing portions of someone else's published or unpublished material, regardless of the source, and presenting these as one's own without proper citation or reference to the original source. Examples of sources from which the ideas, expressions of ideas or works of others may be drawn from include but are not limited to: books, articles, papers, literary compositions and phrases, performance compositions, chemical compounds, art works, laboratory reports, research results, calculations and the results of calculations, diagrams, constructions, computer reports, computer code/software, and material on the Internet. Plagiarism is a serious offence. More information on the University's **Academic Integrity Policy** can be found at: <https://carleton.ca/registrar/academic-integrity/>.

DEPARTMENT POLICIES

The Department of Law and Legal Studies operates in association with certain policies and procedures. Please review these documents to ensure that your practices meet our Department's expectations: <https://carleton.ca/law/student-experience-resources/>.

COVID-19 PREVENTION MEASURES

All members of the Carleton community are required to follow COVID-19 prevention measures and all mandatory public health requirements (e.g. wearing a mask, physical distancing, hand hygiene, respiratory and cough etiquette) and [mandatory self-screening](#) prior to coming to campus daily.

If you feel ill or exhibit COVID-19 symptoms while on campus or in class, please leave campus immediately, self-isolate, and complete the mandatory [symptom reporting tool](#). For purposes of contact tracing, attendance will be taken in all classes and labs. Participants can check in using posted QR codes through the cuScreen platform where provided. Students who do not have a smartphone will be required to complete a paper process as indicated on the [COVID-19 website](#).

All members of the Carleton community are required to follow guidelines regarding safe movement and seating on campus (e.g. directional arrows, designated entrances and exits, designated seats that maintain physical distancing). In order to avoid congestion, allow all previous occupants to fully vacate a classroom before entering. No food or drinks are permitted in any classrooms or labs.

For the most recent information about Carleton's COVID-19 response and required measures, please see the [University's COVID-19 webpage](#) and review the [Frequently Asked Questions \(FAQs\)](#). Should you have additional questions after reviewing, please contact covidinfo@carleton.ca

Please note that failure to comply with University policies and mandatory public health requirements, and endangering the safety of others are considered misconduct under the [Student Rights and Responsibilities Policy](#). Failure to comply with Carleton's COVID-19 procedures may lead to supplementary action involving Campus Safety and/or Student Affairs.

ACADEMIC ACCOMMODATIONS

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

Pregnancy obligation: write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For accommodation regarding a formally-scheduled final exam, you must complete the [Pregnancy Accommodation Form](#).

Religious obligation: write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details [click here](#).

Academic Accommodations for Students with Disabilities: [The Paul Menton Centre for Students with Disabilities](#) (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or pmc@carleton.ca for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your Letter of Accommodation at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (if applicable). After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (if applicable).

Survivors of Sexual Violence

As a community, Carleton University is committed to maintaining a positive learning, working and living environment where sexual violence will not be tolerated, and where survivors are supported through academic accommodations as per Carleton's Sexual Violence Policy. For more information about the services available at the university and to obtain information about sexual violence and/or support, visit: <https://carleton.ca/equity/sexual-assault-support-services>

Accommodation for Student Activities

Carleton University recognizes the substantial benefits, both to the individual student and for the university, that result from a student participating in activities beyond the classroom experience. Reasonable accommodation will be provided to students who compete or perform at the national or international level. Write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist: <https://carleton.ca/senate/wp-content/uploads/Accommodation-for-Student-Activities-1.pdf>

For more information on academic accommodation, please visit: <https://students.carleton.ca/services/accommodation/>.