

1. COURSE NAME AND NUMBER: *Law & Social Change: Anti-Discrimination Law (2751H.03)*

2. COURSE INSTRUCTOR

Name: Anthony Sangiuliano

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Availability for Appointments: Wednesday, 2:00 pm – 3:00 p.m. (please email in advance to arrange for meeting in-person or by Zoom, or to schedule a meeting at an alternative date or time)

3. COURSE INFORMATION

a. Class Times and Location: Wednesdays, 9:30 am – 12:30 am, Room 2002

b. Learning Objectives:

This course surveys legal principles of anti-discrimination law in Canada. We will begin by studying recent Supreme Court of Canada jurisprudence on section 15 of the *Canadian Charter of Rights and Freedoms* as well as the prohibition of racial profiling in policing under section 9 of the *Charter*. We will then consider the interpretation and application of Ontario's *Human Rights Code*. Topics covered include: the legal tests a claimant must meet to demonstrate a limit on section 15 of the *Charter* and a breach of the Code; the nature of the "prohibited grounds" under the *Charter* and the Code; the scope of the Code's "regulated spheres" of employment, accommodations, the provision of goods and services, and contracts; legal defences available to a respondent under the Code, including the "bona fide occupational requirement" defence. With this foundational knowledge in hand, we will then explore three frontiers of anti-discrimination law in Canada. First, we will study affirmative action under section 15(2) of the *Charter* and the "special programs" provision of the Code. Second, we will consider the legal regulation of algorithmic discrimination under Canada's new *Artificial Intelligence and Data Act*. Third, we will look at how the common law of torts, contract, and property can be reformed to address discrimination. Our survey will be supplemented by comparisons with legal doctrines in the United States and the United Kingdom. We will also reflect on some philosophical theories about what makes discrimination morally wrong and the moral justification for legal prohibitions of discrimination.

By the end of this course, students will be able to:

- Recognize and critically evaluate legal principles of anti-discrimination in various contexts in Canada ranging from constitutional law, policing, and employment, accommodations, and the provision of services
- Understand the requirements for litigating discrimination disputes in these contexts

- Appreciate differences between Canadian anti-discrimination law and the law in the United Kingdom, Europe, and the United States of America
- Engage in independent reading, research, and reflection on the ethics of anti-discrimination and the purposes of anti-discrimination law to form opinions on law reform in this area
- Apply knowledge and analytical capacities to emerging areas of anti-discrimination law, including affirmative action, artificial intelligence, and the common law
- Communicate opinions on anti-discrimination clearly and cogently in writing and orally

c. Evaluation:

- 1) Participation In-Class Discussion (10%): This course will include lectures as well as in-class discussion between students and the instructor.
- 2) Weekly Writing Assignments (30%): Before each meeting, students will be asked to write short blog posts, of a paragraph or two, on the course website in response to reading questions posted by the instructor on the website.
- 3) Final Research Paper (60%): This course satisfies the **Upper Year Research and Writing Requirement (UYRWR)**. Students will write a final research paper of **between 7,000 and 7,500** words. It will be due on **April 8, 2024, at 3:30 p.m.** via the Osgoode electronic submission drop box. Requests for extensions should be directed Assistant Dean, Students, Mya Rimón. Students must submit a short research proposal to the instructor explaining the intended topic and thesis of the paper. The proposal must be one paragraph long and include a one-page bibliography of secondary sources. The instructor will provide written feedback on the proposal. The proposal itself will not be graded. It will be due on **Friday, February 9, 2024.**

d. Feedback During and After the Course

For students wishing to receive feedback on their understanding of the course materials, you are welcome to contact me during my term by scheduling a meeting with me during my office hours. You may also email me brief questions during the term. In your message, please explain the background or context for your question and what you have done to try and find the answer prior to emailing me.

Following the release of grades after the end of term, please contact me by email if you wish to discuss your assessment. By the Academic Rules, a student has three weeks after grades are released to make this request. Unless otherwise arranged, we would schedule the meeting to take place over Zoom.

e. Class Climate:

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This course embraces civility, diversity, inclusion, and respect. All students are expected to engage in class discussions and activities in ways that are civil, professional, informed, and that promote an inclusive and positive learning environment for all students. Some of the materials that we will engage with may involve issues that are conceptually and emotionally challenging. Reading and discussing some materials may be difficult especially if we, or others close to us, have personally experienced a similar form of injustice or discrimination to those in the materials. We can and should assume that many in the class will have personal and potentially painful connections to some of the issues discussed in class. Those connections and experiences will be varied, and there is much we can learn from each other. To do so requires that, in our discussions, we remain mindful of this reality, and that we treat each other with respect and kindness. All points of view are welcome so long as they are expressed respectfully and do not abuse the right to speak freely. Students are welcome to disagree with each other and with the instructor. We will make sure to respond to one another's contributions with respect, try to understand where others are coming from and the diversity of responses to the materials we read, and try to learn from one another while collectively engaging in a sincere project of understanding our subject matter.

f. Content:

The reading schedule follows. Links to cases we will be discussing will be posted on the course website. Secondary materials will be uploaded to the course website.

INTRODUCTION: WHAT IS DISCRIMINATION?

Meeting 1 (January 3)	Ethical and Legal Concepts of Discrimination <ul style="list-style-type: none">• Benjamin Eidelson, <i>Discrimination and Disrespect</i>, pp. 13-30, 71-80, 95-101• Tarunabh Khaitan, <i>A Theory of Discrimination Law</i>, pp. 1-6, 23-43, 160-162
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PART I: SECTION 15 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

Meeting 2 (January 10)	Foundations <ul style="list-style-type: none">• <i>Canadian Charter of Rights and Freedoms</i>, Part I of the <i>Constitution Act, 1982</i>, being Schedule B to the <i>Canada Act 1982 (UK)</i>, 1982, c 11, s 15• <i>Andrews v Law Society of British Columbia</i>, [1989] 1 SCR 143, McIntyre J• <i>Eldridge v. British Columbia (Attorney General)</i>, [1997] 3 SCR 624,
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	<p>paras 58-59</p> <ul style="list-style-type: none">• <i>Law v Canada (Minister of Employment and Immigration)</i>, [1999] 1 S.C.R. 497, para 88• <i>R v Kapp</i>, 2008 SCC 41, paras 14-25• Sandra Fredman, “Substantive Equality Revisited”
Meeting 3 (January 17)	The Contemporary Debate <ul style="list-style-type: none">• <i>Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux</i>, 2018 SCC 17• <i>Fraser v Canada (Attorney General)</i>, 2020 SCC 28• <i>R v CP</i>, 2021 SCC 19• <i>R v Sharma</i>, 2022 SCC 39

PART II RACIAL PROFILING

Meeting 4 (January 24)	<ul style="list-style-type: none">• <i>R v Brown</i> (2003), 64 OR (3d) 161, paras 6-11• <i>Peart v Peel Regional Police Services</i> (2006), 217 OAC 269 (CA)• <i>R v Le</i>, 2019 SCC 34, Brown and Martin JJ• <i>R v Dudhi</i>, 2019 ONCA 665, paras 54-66• <i>R v Sitladeen</i>, 2021 ONCA 303, Feldman JA• Adam Omar Hosein, “Racial Profiling and a Reasonable Sense of Inferior Political Status”
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PART III THE ONTARIO HUMAN RIGHTS CODE

Meeting 5 (January 31)	Structural Overview <ul style="list-style-type: none">• <i>Human Rights Code</i>, RSO 1990, c H.19, Parts I-II, ss 29, 34, 45.2(1), 47(2)• <i>Winnipeg School Division No. 1 v Craton</i>, [1985] 2 SCR 150 Regulated Spheres <ul style="list-style-type: none">• <i>McCormick v Fasken Martineau DuMoulin LLP</i>, 2014 SCC 39• <i>British Columbia Human Rights Tribunal v Schrenk</i>, 2017 SCC 62, Rowe J Critical Perspectives <ul style="list-style-type: none">• Matt Zwolinski, “Why Not Regulate Private Discrimination?”
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	<ul style="list-style-type: none"> • Katherine T Bartlett & Mitu Gulati, “Discrimination by Customers,” pp. 228-241
Meeting 6 (February 7)	<p>The Prohibited Grounds</p> <ul style="list-style-type: none"> • Sandra Fredman, <i>Discrimination Law</i>, pp. 110-139 <p>Intersectionality</p> <ul style="list-style-type: none"> • <i>Baylis-Flannery v DeWilde (Tri Community Physiotherapy)</i>, 2003 HRTO 28 at paras 43-49 <p>Symmetry</p> <ul style="list-style-type: none"> • Naomi Schoenbaum, “The Case for Symmetry in Antidiscrimination Law,” pp. 98-120 <p>Novel Grounds</p> <ul style="list-style-type: none"> • <i>Casamitjana v League Against Cruel Sports</i>, [2020] UKET 3331129/2018 • <i>Jackson v Lidl Great Britian Ltd</i> [2020] UKET 3301927/2020
February 9	<p style="text-align: center;">*** Final Research Paper Proposals Due ***</p>
Meeting 7 (February 14)	<p>The <i>Prima Facie</i> Test</p> <ul style="list-style-type: none"> • <i>Ont Human Rights Comm v Simpsons-Sears</i>, [1985] 2 SCR 536 • <i>Shaw v Phipps</i>, 2012 ONCA 155 • <i>Peel Law Association v Pieters</i>, 2013 ONCA 396 • <i>Stewart v Elk Valley Coal Corp</i>, 2017 SCC 30, McLachlin CJ • <i>Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)</i>, 2021 SCC 43 at paras 96-102, 148-150 <p>Direct and Indirect Discrimination</p> <ul style="list-style-type: none"> • Sophia Moreau, “The Moral Seriousness of Indirect Discrimination”
Meeting 8 (February 29)	<p>The <i>Bona Fide</i> Occupational Requirement Defense</p> <ul style="list-style-type: none"> • <i>British Columbia (Public Service Employee Relations Commission) v BCGSEU</i>, [1999] 3 SCR 3 [“Meiorin”] • <i>Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)</i>, 2008 SCC 43 at paras 11-19 <p>The Special Interest Organization Defense</p> <ul style="list-style-type: none"> • <i>HS v The Private Academy</i>, 2017 HRTO 791

	The Recreational Clubs Defense <ul style="list-style-type: none">• <i>Vandervelde v Goodlife Fitness Centres Inc</i>, 2012 HRTO 1042
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**PART IV
ALGORITHMIC DISCRIMINATION**

Meeting 9 (March 6)	Ethics <ul style="list-style-type: none">• Deborah Hellman, “Big Data and Compounding Injustice” Europe <ul style="list-style-type: none">• Frederik J Zuiderveen Borgesius, “Strengthening Legal Protection against Discrimination by Algorithms and Artificial Intelligence” The United States <ul style="list-style-type: none">• Michael Selmi, “Algorithms, Discrimination, and the Law”
Meeting 10 (March 13)	Canada <ul style="list-style-type: none">• Vivek Krishnamurthy, “AI and Human Rights Law”• <i>Artificial Intelligence and Data Act</i>, Bill C-27, 44th Parl 1st Sess• Teresa Scassa, “Regulating AI In Canada: A Critical Look at the Proposed <i>Artificial Intelligence and Data Act</i>”

**PART V
AFFIRMATIVE ACTION**

Meeting 11 (March 20)	Canada <ul style="list-style-type: none">• <i>R v Kapp</i>, 2008 SCC 41, at paras 27-55• <i>Alberta (Aboriginal Affairs and Northern Development) v Cunningham</i>, 2011 SCC 37, at paras 38-55• <i>Centrale des syndicats du Québec v Quebec (Attorney General)</i>, 2018 SCC 18, at paras 37-40• <i>Ontario (Human Rights Commission) v Ontario</i> (1994), 19 OR (3d) 387 (CA) [Roberts] United States <ul style="list-style-type: none">• <i>Students for Fair Admissions v Harvard</i>, 600 US 181 (2023)• Julie Suk, “Discrimination and Affirmative Action”
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PART VI
THE COMMON LAW

<p>Meeting 12 (March 27)</p>	<p>Obstacles</p> <ul style="list-style-type: none"> • <i>Christie v The York Corporation</i>, [1940] SCR 139, Rinfret J • <i>Re Drummond Wren</i>, [1945] OR 778 • <i>Noble v Alley</i>, [1951] SCR 64, Rand J • <i>Seneca College v Bhadauria</i>, [1981] 2 SCR 181 • Jane Thomson & Ashleigh Keall, “Silent All These Years: Public policy, Expressive Harm and the Legacy of <i>Christie v York Corporation</i>”
<p>Meeting 13 (April 3)</p>	<p>Possibilities</p> <ul style="list-style-type: none"> • <i>MacDonald v 283076 Ontario Inc</i> (1979), 26 OR (2d) 1 (CA) • <i>McGraw v Southgate (Township)</i>, 2021 ONSC 7000, paras 191-213 • <i>Canada Trust Co v Ontario Human Rights Commission</i> (1990), 74 OR (2d) 481, Tarnopolsky JA (CA) • <i>Merrifield v Canada (Attorney General)</i>, 2019 ONCA 205, paras 19-53 • <i>Ahluwalia v Ahluwalia</i>, 2023 ONCA 476, paras 47-93 • Rakhi Ruparelia, “I Didn't Mean it that Way!': Racial Discrimination as Negligence”
<p>April 8</p>	<p>*** Final Research Paper Due ***</p>

4. OSGOODE AND YORK ACADEMIC POLICIES

a. Academic Honesty and Integrity:

Osgoode students are required to maintain high standards of academic integrity and are subject to the [York Senate Policy on Academic Honesty](#) and the relevant [Osgoode Academic Rules](#). Further information is available on the [York Academic Integrity](#) site.

The Senate Policy and Osgoode Academic Rules are also available via the *JD Students* part of the MyOsgoode website, proceeding through the “Student Handbooks” button, then “JD Academic Handbook”, and the finally the “Academic Rules” link.

Special attention is drawn to the following three matters related to reliance on external persons, works, and technologies:

- 1) Unauthorized use of collaborative study materials

The provisions of the York Senate Policy on Academic Honesty on unauthorized collaboration

have been supplemented by Osgoode's "[Guidelines on use of Collaborative Study Materials in Examinations](#)", found [HERE](#). Students are strongly advised to read the Guidelines closely; knowledge of them will be assumed. Note a key bottom-line is that use of collaborative study materials in the ways and contexts set out in the Guidelines is prohibited unless explicitly permission by the instructor and, then, only to the extent of that authorization.

2) Unauthorized assistance from generative artificial intelligence

The following is part of the Exam Information page that all students are expected to read and abide by:

Students may not use any generative AI tools (e.g. ChatGPT) to produce text, or as the basis for text, that is submitted on an examination unless explicitly permitted by the instructor in the course because York's [Senate Policy on Academic Honesty](#) treats "obtaining assistance by means of documentary, electronic or other aids which are not approved by the instructor" as cheating.

This rule applies as well to all work submitted for evaluation for a course, whether or not an exam. Note that best practice is for an instructor to put any explicit permission in writing, such as in the course outline; students are advised not to rely on oral authorization and their interpretation of it.

3) Unattributed paraphrasing

Special attention should be paid to the fact that, in the York Senate Policy on Academic Honesty, the definition of plagiarism includes unattributed paraphrasing:

2.1.3 Plagiarism is the misappropriation of the work of another by representing another person's ideas, writing or other intellectual property as one's own. This includes the presentation of all or part of another person's work as something one has written, *paraphrasing another's writing without proper acknowledgement*, or representing another's artistic or technical work or creation as one's own. Any use of the work of others, whether published, unpublished or posted electronically, attributed or anonymous, must include proper acknowledgement. (emphasis added)

b. Religious Observance:

York University is committed to respecting the religious beliefs and practices of all members of the community, and making accommodations for observances of special significance to adherents. Should any of the dates relating to examinations or assignments for this course pose such a conflict for you, please let Assistant Dean, Students, Mya Rimon know within the first three weeks of class.

c. Students with Disabilities and Accommodation Needs:

York University has a range of resources to assist students with physical, mental, and learning disabilities/challenges in achieving their educational objectives. Students with disabilities requiring accommodation in the classroom or in the examination or evaluation process are encouraged to identify themselves to [York's Student Accessibility Services](#) office or Osgoode's Office of Admissions & Student Services as soon as possible.

Students seeking accommodation in experiential education settings are encouraged to read the "Accommodation Information for Clinical & Intensive Program" handout provided to them with their enrolment offer. All requests for accommodation will be kept confidential.

Requests for accommodation for in-term work must be made, in writing, to either the instructor or to the Assistant Dean, Students, Mya Rimón. Such requests must be made as soon as the need for accommodation arises and, barring exceptional circumstances, in advance of the deadline for the work.

Requests for accommodation for final examinations and final papers may only be made to and approved by the Assistant Dean, Students, Mya Rimón and must be made in advance of the examination date or final paper due date.

d. Other York University Policies, including Ethics Review Process:

Further information concerning relevant York University academic policies, such as the Ethics Review Process for research involving human participants is available online via the [University Secretariat](#).

5. POLICIES REGARDING STREAMING AND RECORDING FOR IN-PERSON, REMOTE, AND HYFLEX (DUAL-DELIVERY) TEACHING AND LEARNING

a. Remote and Hyflex classes in 2023-24:

In 2023-24, a handful of courses are being delivered fully remotely (i.e., using Zoom), partly remotely (blending in-person classes for the majority of the class with less frequent online classes or modules) or by Hyflex (dual-delivery). The Hyflex mode of delivery involves some students joining class in real-time from an online connection while the rest of the students are in-person in the physical classroom with the instructor.

Note, however, that instructors of in-person courses have the discretion for pedagogical reasons to run some classes in a way that has students attending online, whether everyone is online including the instructor (fully remote on Zoom) or whether some are online with the instructor in the physical classroom with other students (Hyflex). The number of such classes is

limited by Osgoode’s definition of an in-person course as being a course that is predominantly and essentially in person.

b. Modes of Delivery in 2023-24, Streaming, and Recording:

With respect to lecture classes in “courses” (as opposed to “seminars”), class sessions must be recorded – whatever mode in which they are being taught – in order to be in compliance with Osgoode’s recording policy for lecture courses. For regular in-person lecture sessions, that means recording from the computer console at the front of the class of both the instructor’s voice and the screen display using a platform called Panopto. If a given lecture class session is done in a synchronous remote mode (Zoom) or a Hyflex mode, it too must be recorded under Osgoode’s recording policy.

Then, for any of these modes, it is left to the pedagogical judgment of the instructor as to whether the recording will be posted on eClass for all students in the course to access. Where an instructor decides not to make the recording of their lecture class available to all students in the class (as they are permitted to decide), the recording must nonetheless be made available to any student who has an accommodation that requires access to the recording.

As for seminars, there is no duty to record seminar sessions under Osgoode’s policy but an instructor may record a class session (or indeed the whole course) if they wish. If they decide to, it is further in their discretion as whether to post the recording to the eClass site. As well, the above-mentioned discretion to have some classes that are not fully in-person – e.g., that are fully remote on Zoom or optionally remote for students via Hyflex – also comes with a discretion (but no duty) to record and upload.

c. Consent and Protections:

Whether in lecture classes of a course or in a seminar, activities for any class delivered synchronously online and any class delivered by Hyflex’s dual-delivery method involve live streaming. They may also, and usually do, involve recording. They may further involve storing the recording online in order to make the recording available to the class, after the class has ended, on the eClass platform.

Images, audio, text/chat messaging that have been recorded may be used and/or made available by the University to students enrolled in the course and those supporting the course for the purpose of materials review, for assessment, etc. Recordings will be managed according to the University’s Common Record Schedule and will be securely destroyed when no longer needed by the University. Your personal information is protected in accordance with York’s [Policy on Access of Information and Protection of Privacy](#) and the [Freedom of Information and Protection of Privacy Act](#).

The University will use reasonable means to protect the security and confidentiality of the recorded information, but cannot provide a guarantee of such due to factors beyond the University's control, such as recordings being forwarded, copied, intercepted, circulated, disclosed, or stored without the University's knowledge or permission, or the introduction of malware into computer system which could potentially damage or disrupt the computer, networks, and security settings. The University is not responsible for connectivity/technical difficulties or loss of data associated with your hardware, software, or Internet connection.

By engaging in course activities that involve recording, you are consenting to the use of your appearance, image, text/chat messaging, and voice and/or likeness in the manner and under the conditions specified herein.

In the case of a live stream recording during a remote class, if you choose not to have your image or audio recorded, you may disable the audio and video functionality. In the case of a live stream recording in a Hyflex (dual-delivery) class in which some students are in-person with the instructor and some students remote online, if you choose not to have your image or audio recorded, you may opt to attend the Hyflex class from the remote end, at which point you can disable the audio and video functionality.

In each such choice situation, the power to choose should be exercised against a background understanding that disabled audio and video can seriously affect the interactive dynamics of a class environment and the collective benefits of such interaction. Accordingly, if an instructor requests students not to turn off their cameras, students should not understand this as an order but as a considered preference based on serious reflection on pedagogy. You may still exercise your choice but are requested not to do so if turning off video or audio is more a matter of convenience than of principled objection to being seen or heard in a class.

d. Duties:

You are not permitted to disclose the link to/URL of an event or an event session recording to anyone, for any reason. Recordings are available only to authorized individuals who have been directly provided the above instructions/link for their use. Recordings for personal use, required to facilitate your learning and preparation of personal course/lecture notes, should not be made without the permission of the instructor or event coordinator and, further, should not be shared with others without the further permission of the instructor or event coordinator.