



# Syllabus

## Foundations of Canadian Law

**(Revised for May 2020)**

**Candidates are advised that the syllabus may be updated from time-to-time without prior notice.**

**Candidates are responsible for obtaining the most current syllabus available.**



## **Foundations of Canadian Law**

### **OBJECTIVES OF THE COURSE**

- To provide NCA applicants with an introduction to and an overview of Canada's legal system and the role of law in Canadian society;
- To review various legal theories as they apply to Canadian law;
- To introduce the overarching legal framework within which the particular areas of law studied in other courses operate;
- To acquaint applicants with the various sources of Canadian law;
- To compare the different branches of Canadian government and to analyze the relationships between and among them;
- To provide applicants with an understanding of the Canadian treaty-making process and the implementation of international law into domestic law;
- To provide applicants with an understanding of the special relationship Aboriginal Peoples have with the Canadian State, and to enable applicants to critically assess the impact of the Canadian legal system upon Aboriginal and other minority communities;
- To provide applicants with an understanding of the nature and function of judicial review and of the basic approaches to statutory interpretation.

### **EVALUATION:**

Evaluation for this course is based on a **100%** open book examination.

The exam will consist of short answer questions, and/or short essay questions, and/or problem questions.

- Short answer questions test candidates' ability to succinctly and correctly evaluate statements about material covered in the syllabus.
- Essay questions test whether candidates have critically engaged with the material listed in the syllabus and have started to form their own opinions about the strengths and weaknesses of the arguments, principles, and doctrines discussed in those materials.
- Problem questions test candidates' ability to identify legal issues, accurately state the applicable legal rules, apply those rules to novel situations, and draw conclusions supported by analysis. In other words, problem questions require the exercise of independent judgment grounded in the application of general rules to specific fact situations.



## CORE MATERIALS

- Forcese, Craig *et al*, *Public Law: Cases, Commentary, and Analysis, Third Edition* (Toronto: Emond Montgomery, 2015).  
<http://www.emond.ca/public-law-analysis-cases-and-commentary-3rd-edition.html>
- Required Canadian case law is indicated following each component and is available free of charge from CanLII: <http://www.canlii.ca/>

## SUPPLEMENTAL MATERIALS

For those interested in reading further on these topics, you may wish to consult the following list of sources available at most Canadian law libraries:

- Gerald Heckman. “The Role of International Human Rights Norms in Administrative Law” (Chapter 16 of Flood and Sossin, eds., *Administrative Law in Context, 3rd Edition*, Emond Montgomery 2018).
- Eisenberg, M., *The Nature of the Common Law*, (Cambridge, Mass: HUP, 1991)
- Fairlie, John & Philip Sworden, *Introduction to Law in Canada, 2<sup>nd</sup> ed.* (Toronto: Emond Montgomery 2019).
- Forcese, Craig & Aaron Freeman. *The Laws of Government: The Legal Foundations of Canadian Democracy, Second Edition* (Toronto: Irwin Law, 2011) - publication details at <http://www.irwinlaw.com/store/product/656/the-laws-of-government--the-legal-foundations-ofcanadian-democracy-second-edition>
- Forsey, Eugene A. *How Canadians Govern Themselves, 9th ed.* (Ottawa: Library of Parliament, 2016) (online): <http://publications.gc.ca/site/eng/9.810414/publication.html>
- Sasha Baglay, *Introduction to the Canadian Legal System*, (Toronto: Pearson, 2015)
- Hogg, Peter W. *Constitutional Law of Canada, 2019 Student Edition* (Toronto: Carswell, 2019).
- Justice Canada, “Canada’s System of Justice” - <https://www.justice.gc.ca/eng/csj-sjc/>
- Schauer, F., *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, (Cambridge, Mass: HUP, 2012)
- Waddams, S.M., *Introduction to the Study of Law, 8th Edition*, (Toronto: Carswell, 2016)



## COMPONENTS:

### 1. Basic Theories of Law

- Positivism and Natural Law
- Feminist Perspectives on Law
- Critical Legal Studies
- Law and Economics

#### Required Readings:

Forcese, Craig, Chapter 2

Cass R. Sunstein, "On Analogic Reasoning" (1993), 106 Harvard Law Review, 741-791  
<http://users.umiacs.umd.edu/%7Ehorty/courses/readings/sunstein-1993-analogy.pdf>

Leslie Green, "Legal Positivism" (2003), Stanford Encyclopedia of Philosophy:  
<https://plato.stanford.edu/entries/legal-positivism/>

Reem Bahdi, "Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness" (2018), 96:1 Canadian Bar Review, 72-119:  
<https://cbr.cba.org/index.php/cbr/article/view/4450>

### 2. Indigenous Peoples and the Law

- Aboriginal Rights and Title
- Indigenous Self-Government Aspirations
- The Modern Treaty Making Process

#### A. Required Readings:

Forcese, Craig, Chapter 3

Section 91(24) of *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3

Section 35 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

*Summary of the Final Report of the Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future:*  
[http://publications.gc.ca/collections/collection\\_2015/trc/IR4-7-2015-eng.pdf](http://publications.gc.ca/collections/collection_2015/trc/IR4-7-2015-eng.pdf)

John Borrows, "Seven Gifts: Revitalizing Living Laws through Indigenous Legal Practice", (2016-2017) 2:1 Lakehead Law Journal:  
<https://llj.lakeheadu.ca/article/view/1490/825>



*United Nations Declaration on the Rights of Indigenous Peoples:*  
<https://undocs.org/A/RES/61/295>

Hayden King, “UNDRIP’s Fundamental Flaw” (2019):  
<https://www.opencanada.org/features/undrips-fundamental-flaw/>

Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples:  
<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>

Current Status of Bill C-262: An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples:  
<https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8160636&Language=E>

Thomas Isaac and Arend J.A. Hoekstra, “Implementing UNDRIP in Canada: Challenges with Bill C-262”:  
[www.casselsbrock.com/CBNewsletter/Implementing\\_UNDRIP\\_in\\_Canada\\_Challenges\\_with\\_Bill\\_C\\_262?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://www.casselsbrock.com/CBNewsletter/Implementing_UNDRIP_in_Canada_Challenges_with_Bill_C_262?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original)

Nigel Bankes, “Implementing UNDRIP: Some Reflections in Bill C-262” (2018):  
<https://ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/>

Alicia Elliot, “A Memo to Canada: Indigenous People are not Your Incompetent Children” *The Globe and Mail*, January 5, 2018: <https://spon.ca/a-memo-to-canada-indigenous-people-are-not-your-incompetent-children/2018/01/07/>

**B. *Required Readings - Re: Aboriginal Rights:***

*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650

*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] 1 SCR 1099

*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40

*Pastion v. Dene Tha’ First Nation*, 2018 FC 648

**C. *Required Readings Re: Aboriginal Title:***

Kent McNeil, “The Source, Nature, and Content of the Crown’s Underlying Title to Aboriginal Title Lands”, (2018) 96:2 *Canadian Bar Review*, 273-293:  
[https://digitalcommons.osgoode.yorku.ca/scholarly\\_works/2709/](https://digitalcommons.osgoode.yorku.ca/scholarly_works/2709/)

*Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44

*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12

*Brown v. Canada (Attorney General)* 2017 ONSC 251



**D. Required Readings - Re: Aboriginal Treaties:**

*R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, 2005 SCC 43 [2005]

**3. Sources of Canadian Law**

- The Common Law and Civil Law Traditions
  - i. Reception of European Law
  - ii. Bijuralism
  - iii. Common Law Method: Precedent and Equity
- Statutory Law
- International Law

**Required Readings:**

Forcese, Craig, Chapter 4

Marie-Claude Gervais and Marie-France Seguin, "Some thoughts on Bijuralism in Canada and the World" (2001) Department of Justice Canada:

<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b2-f2/toc-tdm.html>

*Grimard v. Canada* [2009] FCA 47: <http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/36311/index.do>

Debra Parkes, "Precedent Revisited: *Carter v Canada (AG)* and the Contemporary Practice of Precedent" (2016) 10 McGill Journal of Law and Health 123:

<https://mjlh.mcgill.ca/issues/volume-10-issue-1-101-special-issue-2016/precedent-revisited-carter-v-canada-ag-and-the-contemporary-practice-of-precedent/>

*Tan v. Canada (Attorney General)*, 2018 FCA 186

Lionel Smith, "Equity is Not a Single Thing" (2018):

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3376874](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376874)

Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2(1) CJCL 261: <http://www.cjcl.ca/wp-content/uploads/2016/08/A7.-Hudson-Alastair-Conscience-as-an-Organizing-Concept-for-Equity.pdf>

*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (skim headnote for factual context, read paragraphs 69-71, 78-81)

*De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436

Gib Van Ert, "Canada" in Sloss and Jinks (eds.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, 2009):

<http://www.litigationchambers.com/pdf/vanErt-domestic-courts.pdf>



*Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, paragraphs 1-12 and 72-107

#### **4. Fundamental Principles of the Canadian Legal System:**

- The Constitution of Canada
- Principles Underpinning Public Law
  - i. Rule of Law
  - ii. Constitutional Supremacy
  - iii. Parliamentary Sovereignty
  - iv. Federalism
  - v. Separation of Powers
  - vi. Judicial Independence (Overview)
- Constitutional Amendment

Required Readings:

Forcese, Craig, Chapter 5

*Singh v. Canada (Attorney General)*, 2000 CanLII 17100 (F.C.A.), paras. 13 - 44

#### **5. Parliament and its Components**

- The Monarch and Governor General
- Senate
- House of Commons

Required Readings:

Forcese, Craig, Chapter 6

Barnes et al., "Reforming the Senate of Canada: Frequently Asked Questions", Background Paper, Library of Parliament (2011):

[http://publications.gc.ca/collections/collection\\_2011/bdp-lop/bp/2011-83-eng.pdf](http://publications.gc.ca/collections/collection_2011/bdp-lop/bp/2011-83-eng.pdf)



## 6. Functions of Parliament

- Summoning
- Prorogation
- Dissolution
- Key Actors
- Parliamentary Procedure and Law-Making

### Required Readings:

Forcese, Craig, Chapter 7

*Duffy v. Senate of Canada*, 2018 ONSC 7523

*Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39

*Singh v. Attorney General of Quebec*, 2018 QCCA 257

## 7. The Executive and its Functions

- The Functions of the Executive
- Sources of Executive Power
- Executive Institutions and the Political Executive

### Required Readings:

Forcese, Craig, Chapter 8

*Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062

*Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761

## 8. The Courts and the Judiciary

- Structure of the Canadian Court System
- Judicial Appointments
- Judicial Independence

### Required Readings:

Forcese, Craig, Chapter 9





Sonia Lawrence, “ Reflections: On Judicial Diversity and Judicial Independence” in Dodek, Adam M. and Sossin, Lorne, (eds.), *Judicial Independence in Context* (Toronto: Irwin Law, 2010),193: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2043089](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2043089)

## 9. Statutory Interpretation

- Approaches to Interpretation
- The Modern Approach to Interpretation

### Required Readings:

Forcese, Craig, Chapter 10, pp.425-480; 506-518

Ruth Sullivan, “Some Problems with the Shared Meaning Rule as Formulated in R v Daoust and The Law of Bilingual Interpretation” (2010) 42:1 Ottawa Law Review 71, 2010 CanLIIDocs 76: <http://www.canlii.org/t/28dw>

John Mark Keyes and Carol Diamond, “Constitutional Inconsistency in Legislation - Interpretation and the Ambiguous role of Ambiguity” (2017) 48:2 Ottawa Law Review, 315-355: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3059885](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3059885)

## 10. Constraints on Legislative and Administrative Action

- Judicial Review in a Democratic Society
- Judicial Review of Administrative Action

### Required Readings:

Forcese, Craig, Chapter 11

Audrey Macklin on the Supreme Court of Canada’s Administrative Law ‘Trilogy’ (2018): <https://www.administrativelawmatters.com/blog/2018/12/14/audrey-macklin-on-the-supreme-court-of-canadas-administrative-law-trilogy/>

Lorne Sossin, “Dunsmuir – Plus ça change Redux” (2018): [www.administrativelawmatters.com/blog/2018/03/07/dunsmuir-plus-ca-change-redux-lorne-sossin/](http://www.administrativelawmatters.com/blog/2018/03/07/dunsmuir-plus-ca-change-redux-lorne-sossin/)

Naiomi Metallic, “Deference and Legal Frameworks Not Designed By, For or With Us” (2018): <http://www.administrativelawmatters.com/blog/2018/02/27/deference-and-legal-frameworks-not-designed-by-for-or-with-us-naiomi-metallic/>

*Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65 [Headnote and paras 1-197]  
[https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18078/index.do?site\\_preference=normal&pedisable=true](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18078/index.do?site_preference=normal&pedisable=true)



Paul Daly, "The Vavilov Framework and The Future of Canadian Administrative Law" (15 January 2020):

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3519681](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519681)



### Canadian Publishers

**Carswell (Thomson Reuters)**

Corporate Plaza  
2075 Kennedy Road  
Scarborough, ON M1T 3V4

Tel: 416.609.3800 or 1.800.387.5164  
Email: [carswell.customerrelations@thomsonreuters.com](mailto:carswell.customerrelations@thomsonreuters.com)  
URL: <http://www.carswell.com/>

**Irwin Law Inc.**

14 Duncan St.  
Toronto, ON M5H 3G8

Tel: (Canada & U.S.) 416.862.7690 or 1.888.314.9014  
Fax: 416.862.9236  
Email: [contact@irwinlaw.com](mailto:contact@irwinlaw.com)  
URL: <http://www.irwinlaw.com/>

**Emond Montgomery**

60 Shaftesbury Ave.  
Toronto, ON M4T 1A3

Tel: 416.975.3925  
Fax: 416.975.3924  
Email: [info@emp.ca](mailto:info@emp.ca)  
URL: <http://www.emp.ca/>

**Lexis Nexis Canada Inc.**

(For printed material only and  
not for access to Quicklaw)

Contact: Customer Service  
Tel: 905.415.5823 or 1.800.668.6481  
Fax: 905.479.4082 or 1.800.461.3275  
Email: [Customerservice@lexisnexis.ca](mailto:Customerservice@lexisnexis.ca)  
URL: <http://www.lexisnexis.ca/en-ca/home.page>

**Canada Law Books**

240 Edward St.  
Toronto, ON L4G 3S9

Tel: (Canada & U.S.) 416.609.3800 or 1.800.387.5164  
Email: [carswell.customerrelations@thomsonreuters.com](mailto:carswell.customerrelations@thomsonreuters.com)  
URL: <http://www.carswell.com/>

### Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada ([www.canlii.org](http://www.canlii.org)). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

Your registration fee also includes free access to the Quicklaw resources of Lexis Nexis. Your ID and password will be arranged and emailed to your email address on file a few weeks after the end of the registration session.

Sign in to Quicklaw via <http://www.lexisnexis.com/ca/legal>. The first time you sign in to Quicklaw you will be asked to change or personalize your password. Remember your User ID and password are personal, and should not be shared with anyone.

If you forget or lose your password to Quicklaw you may retrieve it by clicking on the "Forget Password?" link on the Quicklaw sign-in page. Any other issues please Email [ftang@flsc.ca](mailto:ftang@flsc.ca).

Please review and abide by all Terms of Use when you receive your Quicklaw credentials, otherwise your Quicklaw account will be closed without any prior notice.

Lexis Nexis Quicklaw customer support is available via [service@lexisnexis.ca](mailto:service@lexisnexis.ca), or calling 1.800.387.0899.