



Syllabus

Foundations of Canadian Law

(Revised for November 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 essay questions, and/or problem questions, and/or multiple-choice questions.

Short answer questions and multiple-choice questions test candidates' ability to succinctly 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

1. Forcese, Dodek *et al*, *Public Law: Cases, Commentary, and Analysis, Fourth Edition* (Toronto: Emond Montgomery, 2020). [Referred to below as “Forcese”.]
www.emond.ca/public-law-cases-commentary-and-analysis-4th-edition.html
2. Prescribed cases (not included in the above text) are available free of charge from CanLII: 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, 2nd ed.* (Toronto: Emond Montgomery 2019)

Forcese, Craig & Aaron Freeman. *The Laws of Government: The Legal Foundations of Canadian Democracy, 2nd Edition* (Toronto: Irwin Law, 2011).

Forsey, Eugene A. *How Canadians Govern Themselves, 10th ed.* (Ottawa: Library of Parliament, 2020): <https://lop.parl.ca/about/parliament/senatoreugeneforsey/book/preface-e.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”: www.justice.gc.ca/eng/csjsj/

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, Chapter 2

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>

Robin Maynard, "Arrested (In)justice: From the streets to the prison" in *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Fernwood Publishing, 2017)
https://ocpm.qc.ca/sites/ocpm.qc.ca/files/pdf/P100/8-38_robyn_maynard.pdf

2. Indigenous Peoples and the Law

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

A. Required Readings:

Forcese, 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



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):

www.opencanada.org/features/undrips-fundamental-flaw/

Naiomi Walqwan Metallic, “A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case.” (2018) 28 Journal of Law and Social Policy 41:

<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1337&context=jlsp>

Brenda L. Gunn, “Implementing the UN Declaration through Domestic Legislation: A Canadian Example” in UNDRIP Implementation, Comparative Approaches, Indigenous Voices from CANZUS (2020) at p.67:

www.cigionline.org/sites/default/files/documents/UNDRIPIII_web_mar27.pdf

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, [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

The Queen v Richard Lee Desautel, 2019 BCCA 151

Scott Carrière, “Whose Sovereignty is it Anyway? The Borders of Aboriginal Rights along the Sovereign Borders of Canada” (January 20, 2020):

https://ablawg.ca/wp-content/uploads/2020/01/Blog_SC_Desautel.pdf

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/

Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani Utenam), 2020 SCC 4

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

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, 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/bf2.pdf>

Grimard v. Canada [2009] FCA 47

Hill v. Church of Scientology of Toronto, [1995] 2 SCR 1130

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

https://mjlhmccgill.files.wordpress.com/2017/07/mjlh_10_1_parkes1.pdf

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

Catherine Valcke, "Quebec Civil Law and Canadian Federalism" (1996) 21 Yale J. of International Law, 67-121:

<https://pdfs.semanticscholar.org/628f/ac137bb28dd8f340623479421a81d71b5505.pdf>

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

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376874



Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 (read 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)
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

Claire L'Heureux-Dube, "The Dissenting Opinion: Voice of the Future?" *Osgoode Hall Law Journal* 38.3 (2000): 495-517.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol38/iss3/4>

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, Chapter 5

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

Alyn James Johnson, "The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project", 2019 56-4 *Alberta Law Review* 1077:
www.canlii.org/t/skqd



5. Parliament and its Components

The Monarch and Governor General

Senate

House of Commons

Required Readings:

Forcese, Chapter 6

Barnes et al., “Reforming the Senate of Canada: Frequently Asked Questions”,
Background Paper, Library of Parliament (2011): www.deslibris.ca/ID/230487

6. Functions of Parliament

Summoning

Prorogation

Dissolution

Key Actors

Parliamentary Procedure and Law-Making

Required Readings:

Forcese, 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, Chapter 8



Lorne Sossin, “The Puzzle of Independence and Parliamentary Democracy in the Common Law World” in Susan Rose-Ackerman et al, *Comparative Administrative Law*, 2nd ed., (Edward Elgar Publishing, 2017)
https://law.yale.edu/sites/default/files/area/conference/compadmin/compadmin16_sossin_puzzle.pdf

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

Toronto v. AG Ontario 2019 ONCA 732

8. The Courts and the Judiciary

Structure of the Canadian Court System

Judicial Appointments

Judicial Independence

Required Readings:

Forcese, 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

Eszter Bodnár, “What Can the World Learn from Canada, What Can Canada Learn from the World?” (2017) *Elte Law Journal*:

https://eltelawjournal.hu/wp-content/uploads/2019/02/09_Bodnar.pdf

Smith v. Canada (Attorney General), 2020 FC 629

9. Statutory Interpretation

Approaches to Interpretation

The Modern Approach to Interpretation

Required Readings:

Forcese, 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

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

10. Constraints on Legislative and Administrative Action

Judicial Review in a Democratic Society

Judicial Review of Administrative Action

Required Readings:

Forcese, Chapter 11

Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518

Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall, 2018 SCC 26

Mary Liston, “Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process” in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016) 213:

https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1214&context=fac_pubs

Paul Daly, “Vavilov Hits the Road”:

<https://www.administrativelawmatters.com/blog/2020/02/04/vavilov-hits-the-road/>

Paul Daly, “*Vavilov* and the Culture of Justification in Contemporary Administrative Law” (June 3, 2020): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3618743

Cristie Ford, “*Vavilov*, Rule of Law Pluralism, and What Really Matters” (Apr. 27, 2020): www.administrativelawmatters.com/blog/2020/04/27/vavilov-rule-of-law-pluralism-and-what-really-matters-cristie-ford/



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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). 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.

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