



Syllabus

Foundations of Canadian Law

(Revised for 2022)

**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 that are not included in the Forcese text are available free of charge from CanLII: www.canlii.ca/
3. Prescribed articles that are not included in the Forcese text are available online free of charge (website address is specified).

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. “International Human Rights Norms and the Substantive Review of Administrative Decision-Making” (Chapter 14 of Flood and Daly, eds., *Administrative Law in Context, 4th Edition*, Emond Montgomery 2021)

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/csjs-jc/

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; Racism & the Law

Positivism and Natural Law

Feminist Perspectives on Law

Critical Legal Studies

Law and Economics

Required Readings:

- Forcese, Chapter 2
- *R. v. Morris*, 2021 ONCA 680
- *8573123 Canada Inc. v. Keele Sheppard Plaza Inc.* 2021 ONCA 371
- *R. v. Gladue* [1999] 1 S.C.R.
- 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
- 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>
- Don Couturier, "Judicial Reasoning Across Legal Orders: Lessons from Nunavut" (2020) 45:2 Queen's Law Journal 319
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3687860
- "Introduction" in *Summary of the Final Report of the Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future*, pp. 1-21:
http://publications.gc.ca/collections/collection_2015/trc/IR4-7-2015-eng.pdf



- *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada* 2018 CHRT 4, paras 1-2, 114-195 and 451-53
- *United Nations Declaration on the Rights of Indigenous Peoples*:
<https://undocs.org/A/RES/61/295>
- *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*
<https://parl.ca/DocumentViewer/en/43-2/bill/C-15/royal-assent>

B. Required Readings - Re: Aboriginal Rights:

- *Chippewas of the Thames First Nation v. Enbridge Pipelines*, [2017] 1 SCR 1099
- *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40
- *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018
- *SCC Pastion v. Dene Tha' First Nation*, 2018 FC 648
- *R. v. Desautel*, 2021 SCC 17
- 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 Factual Basis for Indigenous Land Rights” *Monash University Law Review*, forthcoming:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3822713
- *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:

- *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, paras. 1-333, 360, 581-628
- Darcy Lindberg, “Historical Lawsuit Affirms Indigenous Laws on Par with Canada’s”, *The Conversation* (16 January 2019): <https://theconversation.com/historical-lawsuit-affirms-indigenous-laws-on-par-with-canadas-109711>



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
- *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://mjlhmcgill.files.wordpress.com/2017/07/mjlh_10_1_parkes1.pdf
- Cass R. Sunstein, “Analogical Reasoning” (October 7, 2021):
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3938546
- *Tan v. Canada (Attorney General)*, 2018 FCA 186
- Henry E Smith, “Equity as Meta-Law” (2021) 130:5 *Yale LJ* 1050:
https://www.yalelawjournal.org/pdf/Smith_i8qnzgea.pdf
- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (read headnote for factual context, read paras. 69-71, 78-81)
- *R. v. Hape* 2007 SCC 26, [2007] 2 SCR 292, (read paras. 1-56)
- *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, (read paras. 1-26; and 60-133)
- 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, paras. 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, Chapter 5
- *Singh v. Canada (Attorney General)*, 2000 CanLII 17100 (F.C.A.), paras. 13-44
- Leonid Sirota, "A Citizen's Guide to the Rule of Law" in Peter L Biro (ed), *Constitutional Democracy under Stress: A Time for Heroic Citizenship* (Mosaic Press, 2020) 104 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656775
- 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
- Andre 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*, 2020 ONCA 536
- *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)*, 2021 SCC 34
- *Toronto v. Ontario (Attorney General)*, 2021 SCC 34



8. The Courts and the Judiciary

Structure of the Canadian Court System

Judicial Appointments

Judicial Independence

Required Readings:

- Forcese, Chapter 9
- *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. 408-516
- 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
- Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" *Alberta Law Review*, forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3947396

10. Constraints on Legislative and Administrative Action

Judicial Review in a Democratic Society

Judicial Review of Administrative Action

Required Readings:

- Forcese, Chapter 11
- *Brown v. Canada (Citizenship and Immigration)* 2020 FCA 130 (read paras. 1-23; and 136-149)
- *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



- Glover Berger, Kate. "The Missing Constitutionalism of Canada v Vavilov." *Journal of Law and Social Policy* 34. (2021): 68-93.
<https://digitalcommons.osgoode.yorku.ca/jlsp/vol34/iss1/4/>
- Lorne Sossin, "The Impact of Vavilov: Reasonableness and Vulnerability" *Supreme Court Law Review, 2nd Series*, Volume 100 (2021) pp. 265-277
<https://www.ontariocourts.ca/coa/en/ps/publications/impact-vavilov.pdf>
- 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