

CONSTITUTIONAL AND PUBLIC LAW

Spring 2019

Instructor: Greg Flynn
Email: flynngr@mcmaster.ca
Lecture: Mon & Wed, 6:30 – 9:30
BSB 136

Office: KTH 543
Office Hours: Mon. 4:00 – 6:00

Contents

Course Description.....	3
Course Objectives.....	3
Optional Materials and Texts.....	3
Class Format.....	3
Course Evaluation – Overview	4
Course Evaluation – Details	4
In-Class Test - 20%, May 13, 2019	4
Factum Assignment – 40%, June 05, 2019	4
Final Exam - 40%, June 19, 2019.....	5
Weekly Course Schedule and Required Readings	5
Week 1 – May 06, 2019 - Introduction	5
Week 2 – May 08, 2019 – The Judiciary.....	5
Week 3 – May 13, 2019 – The Constitution.....	5
Week 4 – May 15, 2019 – The State & State Powers.....	5
Week 5 – May 20, 2019 – Victoria Day – no classes.....	6
Week 6 – May 22, 2019 – Constitutional Law.....	6
Week 7 – May 27, 2019 – Peace Order and Good Government	6
Week 8 – May 29, 2019 – Constitutional Law Post JCPC	6
Week 9 – June 03, 2019 – Criminal Law	6
Week 10 – June 05, 2019 – Criminal Law	7
Week 11 – June 10, 2019 – Administrative Law	7
Week 12 – June 12, 2019 – Administrative Law.....	7
Week 13 – June 17, 2019 – Indigenous/Aboriginal Law	7
Week 14 – June 19, 2019 – Exam	7
Course Policies	8

Submission of Assignments.....	8
Grades.....	8
Late Assignments	8
Absences, Missed Work, Illness	9
Avenue to Learn	10
Turnitin.com.....	10
University Policies	10
Academic Integrity Statement.....	10
Academic Accommodation of Students with Disabilities.....	11
Faculty of Social Sciences E-mail Communication Policy	11
Course Modification.....	11

Course Description

The course is intended to give students a greater understanding of the interaction between politics, the courts and the law and to provide insight into some of the legal and political limitations faced by governments in attempting to make public policy in Canada.

The course explores how the relationship between Canadians and the Canadian state and governments are governed by three bodies of public law – administrative, criminal and constitutional. It will examine the historical, philosophical and theoretical aspects underlying constitutions, the rule of law and an independent judiciary as a base to an extensive investigation of the development, interpretation and evolution of the Canadian Constitution and Canadian public law. This preliminary focus will set the stage for a more intensive review of the major contemporary issues in Canadian public law including: delegated authority and administrative tribunals; criminal law, the division of powers and federalism; the role of the Courts, judicial interpretation of the Constitution and judicial activism; and recent challenges to the Constitution.

Course Objectives

By the end of the course students should be able to:

- describe the structure of the levels of government in Canada, and the constituent elements of the Canadian Constitution;
- explain the role and functioning of the judicial and quasi-judicial administrative processes in the country;
- recognize what level of Court or tribunal is appropriate for adjudication of a particular issue;
- analyze current political and public policy issues from a legal and civil rights perspective;
- apply the knowledge they have gained to generate arguments on either side of an issue and appraise the validity and legitimacy of arguments advanced in public by politicians and the media from a constitutional law perspective; and,
- present arguments and case summaries in written format in a brief, clear and concise manner supported by evidence.

Required Materials and Texts

Various readings (as detailed below) available through the McMaster University libraries or on GoogleScholar

Class Format

The course is scheduled is scheduled for two three-hour sessions per week.

The first two hours of each night will be conducted in an interactive lecture format by the instructor with students having the opportunity to ask questions concerning the

information being provided to them. The third hour of classes will consist of additional time for lecture material, the conducting of the in-class quiz as well as time for students to work on their factum assignments.

In addition to formal class time, students are invited to meet with the instructor during regular office hours or by appointment to discuss course content or any other concerns.

Course Evaluation – Overview

1. In-Class Test - 20%, May 13, 2019.
2. Factum Assignment – 40%, June 05, 2019
3. Final Exam – 40%, June 19, 2019

Course Evaluation – Details

In Class Test - 20%, May 13, 2019.

Students will write a short test of up to one hour on the topics of the rule of law, judicial independence, judicial review and the structure of the judiciary in Canada. The test will involve short answer questions as well as hypothetical scenarios involving the application of the law.

Factum Assignment - 40%, June 05, 2019.

Students will write a factum/legal brief on a topic of contemporary relevance to an appeal to the Supreme Court of Canada.

The instructor will provide a list of relevant topics for students to pursue as well as provide assistance on the structure and scope of a legal factum. In addition, students are welcome (and encouraged) to pursue topics of their own interest for the factum. ***However, the instructor must approve any topics at least two weeks in advance of the deadline that are not on the list provided by the instructor.***

As the factum should involve both legal and social science based research, students may write the paper solely or jointly with up to two other students in the class for a total of three students. Where possible, class time will be provided for students to work on the factum assignment in their groups (or by themselves) and to receive instructor assistance on the assignment.

Unless otherwise agreed to in advance by all students in a group and the instructor, students will all receive the same grade for the assignment and are equally responsible for ensuring that the assignment conforms to requirements of the McMaster University Academic Integrity Policy.

Final Exam - 40%, June 19, 2019

The final exam will follow a similar format to the in-class quiz, but will be based on all materials from June 03, 2019 (Criminal Law, Administrative Law and Indigenous/Aboriginal Law) forward.

Weekly Course Schedule and Required Readings

Week 1 - May 06, 2019 - Introduction

Topic – What is Public Law?

Readings: *None*

Week 2 - May 08, 2108 – The Judiciary

Topics - The Rule of Law, Judicial Independence, Judicial Review and Judicial Structure and Test Review

Readings:

Hogg, Peter and Cara F. Zwibel. 2005. "The Rule of Law in the Supreme Court of Canada" *University of Toronto Law Journal*, 55(3), 715-732.

Week 3 - May 13, 2019 – The Constitution

Topic – Sources of the Constitution

Readings:

Lagasse, Phillip. 2012. "Parliamentary and judicial ambivalence toward executive prerogative powers in Canada" *Canadian Public Administration* 55(2), 157-180.

IN CLASS Test 1 at 6:30 pm

Week 4 - May 15, 2019 – The State & State Powers

Topics - The Legislative and Executive Branches of Government

Readings:

Malloy, Jonathon. 2004. "The Executive and Parliament in Canada" *Journal of Legislative Studies* 10(2-3), 206-217.

Week 5 – May 20, 2019 – Victoria Day

No Class

Readings: None

Week 6 – May 22, 2019 – Constitutional Law

Topics - Judicial Federalism, the JCPC and Trade and Commerce

Readings:

Hogg, Peter and Wade K. Wright. 2005. "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism" *University of British Columbia Law Review* 38(2), 329-352.

Week 7 – May 27, 2019 – Peace Order and Good Government

Topics – POGG and the Gap, Emergency and National Concern Tests

Readings:

Laskin, Bora. 1947. "Peace, Order and good government, re-examined" *Canadian Bar Review* 25, 1054-1087.

Week 8 – May 29, 2019 – Constitutional Law Post-JCPC

Topics - The SCC and Trade and Commerce and POGG

Readings:

Kukucha, Christopher. 2005. "From Kyoto to the WTO: Evaluating the Constitutional Legitimacy of the Provinces in Canadian Foreign Trade and Environmental Policy: *Canadian Journal of Political Science* 38(1), 129-152.

Week 9 – June 03, 2019 – Criminal Law

Topics – Jurisdiction, History and Elements of an Offence

Readings:

Nebitt, Michael and Dana Hagg. 2019. "Terrorism Prosecutions in Canada" Elucidating the Elements of the Offences" *Alberta Law Review* forthcoming.

Week 10 - June 05, 2019 – Criminal Law

Topics – Criminal Defenses

Readings:

Lawrence, Michelle S. 2017. “From Defect to Dangerous: Has the Door Opened for Recognition of an Addiction-Based Defence in Canadian Criminal Law?” *Canadian Journal of Criminology and Criminal Justice* 59(4), 572-582.

Factum Assignment Due

Week 11 – June 10, 2019 – Administrative Law

Topics – Background, History and Procedural Protections

Readings:

Ratushny, Ed. 1987. “What are administrative tribunals? The pursuit of uniformity in diversity” *Canadian Public Administration* 30(1), 1-13.;

Week 12 – June 12, 2019 – Administrative Law

Topics – Procedural Protections and Substantive Review

Readings:

Taucar, Christopher Edward. 2010. “Standards of judicial review of administrative bodies: The consideration of citizen participation” *Canadian Public Administration* 53(1), 67-86.

Week 13 – June 17, 2019 – Indigenous/Aboriginal Law

Topics – History, Land and Rights Claims, and the Duty to Consult

Readings:

Peach, Ian. 2016. “Who speaks for whom? Implementing the Crown’s duty to consult in the in the case of divided Aboriginal structures” *Canadian Public Administration* 59(1), 95-112.

Week 14 – June 19, 2019 – Exam

Course Policies

Submission of Assignments

Written assignments should be provided to the instructor, either at the beginning of class or during office hours prior to class. As a last resort, assignments can be submitted to the box outside of the political science office after hours (date-stamped for the following day) or to the Department of Political Science Office during regular business hours. Assignments will not be accepted that are slipped under the instructor's or any other door.

Papers received by e-mail or fax will not be accepted without the prior express permission of the instructor on each assignment.

Grades

Grades will be based on the McMaster University grading scale:

MARK	GRADE
90-100	A+
85-90	A
80-84	A-
77-79	B+
73-76	B
70-72	B-
67-69	C+
63-66	C
60-62	C-
57-59	D+
53-56	D
50-52	D-
0-49	F

Late Assignments

Students should make all reasonable attempts to submit papers on the due date. In the event that a legitimate extension is required, students should speak to the instructor ***in advance*** of the due date to make the appropriate arrangements for such an extension. Requests for an extension submitted by e-mail will not be considered – you must speak to the instructor in person.

Examinations and/or assignments related to this and other courses do not constitute or qualify as exceptional circumstances or legitimate excuses.

Late papers may be penalized at the rate of five percentage points per working day for each day of delay, up to a maximum of one week. After one week, the instructor may refuse to accept any late assignments in the absence of proper medical certification justifying an inability to fulfill academic requirements on a prolonged basis. Papers

accepted after one week of lateness, in addition to the daily deduction, will be subject to a further deduction of one full letter grade (ie. A to B, B to C) per each week of lateness.

The instructor reserves the right to not provide any comments or feedback on papers submitted after the original deadline, whether an extension is granted or not and whether any other late penalties are applied.

Absences, Missed Work, Illness

Students should make all reasonable efforts to attend and are responsible for the material covered in each and every scheduled class. However, it is understood that some absences are unavoidable and students should make every effort to catch up on missed materials and the instructor will provide reasonable assistance to assist a student. In this regard, students should attempt to obtain lecture notes or other class materials from their colleagues the broader class before seeking assistance from the instructor concerning missed lecture and/or class content.

Requests for the instructor to repeat a lecture or seminar discussion (either during office hours or at any other time) or provide access to the instructor's lecture notes are not reasonable requests for assistance.

In the event that students are unable to attend class or complete required assignments, they should avail themselves of the MSAF policy or submit the appropriate medical or other documentation to their faculty office to support an accommodation request based on a prolonged absence. In the absence of either an MSAF or a faculty approved accommodation request, the instructor reserves the sole right to not accept any outstanding work in accordance with the late assignments policy.

If a student has submitted the appropriate documentation to their faculty and been granted an allowance for outstanding work or has received the approval of the instructor for the incomplete work, the instructor reserves the sole right to re-allocate the missed grades to other assignments.

Please note that an MSAF submission, where permitted, provides a three day extension for any assignment. In the event that students require a further period of time to submit their outstanding work, they must discuss any further extension with the instructor prior to the end of the three day MSAF extension. In the absence of a further approved extension, an assignment subject to an MSAF becomes a late submission after three days.

The filing of an MSAF does not relieve a student of the obligation to complete the outstanding assignment.

Avenue to Learn

In this course we will be using Avenue to Learn. Students should be aware that, when they access the electronic components of this course, private information such as first and last names, user names for the McMaster e-mail accounts, and program affiliation may become apparent to all other students in the same course. The available information is dependent on the technology used. Continuation in this course will be deemed consent to this disclosure. If you have any questions or concerns about such disclosure please discuss this with the course instructor.

Turnitin.com

In this course we will be using a web-based service (Turnitin.com) to reveal plagiarism. Students will be expected to submit their work electronically to Turnitin.com and in hard copy so that it can be checked for academic dishonesty. Students who do not wish to submit their work to Turnitin.com must still submit a copy to the instructor. No penalty will be assigned to a student who does not submit work to Turnitin.com. All submitted work is subject to normal verification that standards of academic integrity have been upheld (e.g., on-line search, etc.). For more information please refer to the [Turnitin.com Policy](#).

University Policies

Academic Integrity Statement

You are expected to exhibit honesty and use ethical behavior in all aspects of the learning process. Academic credentials you earn are rooted in principles of honesty and academic integrity.

Academic dishonesty is to knowingly act or fail to act in a way that results or could result in unearned academic credit or advantage. This behavior can result in serious consequences, e.g. the grade of zero on an assignment, loss of credit with a notation on the transcript (notation reads: "Grade of F assigned for academic dishonesty"), and/or suspension or expulsion from the university.

It is your responsibility to understand what constitutes academic dishonesty. For information on the various types of academic dishonesty please refer to the [Academic Integrity Policy](#).

The following illustrates only three forms of academic dishonesty:

1. Plagiarism, e.g. the submission of work that is not one's own or for which credit has been obtained.
2. Improper collaboration in group work.
3. Copying or using unauthorized aids in tests and examinations.

Academic Accommodation of Students with Disabilities

Students who require academic accommodation must contact Student Accessibility Services (SAS) to make arrangements with a Program Coordinator. Academic accommodations must be arranged for each term of study. Student Accessibility Services can be contacted by phone 905-525-9140 ext. 28652 or e-mail sas@mcmaster.ca. For further information, consult McMaster University's Policy for [Academic Accommodation of Students with Disabilities](#).

Faculty of Social Sciences E-mail Communication Policy

Effective September 1, 2010, it is the policy of the Faculty of Social Sciences that all e-mail communication sent from students to instructors (including TAs), and from students to staff, must originate from the student's own McMaster University e-mail account. This policy protects confidentiality and confirms the identity of the student. It is the student's responsibility to ensure that communication is sent to the university from a McMaster account. If an instructor becomes aware that a communication has come from an alternate address, the instructor may not reply at his or her discretion.

Course Modification

The instructor and university reserve the right to modify elements of the course during the term. The university may change the dates and deadlines for any or all courses in extreme circumstances. If either type of modification becomes necessary, reasonable notice and communication with the students will be given with explanation and the opportunity to comment on changes. It is the responsibility of the student to check his/her McMaster email and course websites weekly during the term and to note any changes.