

CONSTITUTIONAL AND PUBLIC LAW IN CANADA

Fall 2021

Instructor: David Said
Email: saidd@mcmaster.ca
Lecture: Mon. & Thur. 3:30pm - 4:20pm
Tues. 4:30pm – 5:20pm
Room: Virtual Classroom - Zoom

Office: KTH 543
Office Hours: Monday and Tuesday
10:00am – 11:00am or by appointment

Contents

Course Description.....	3
Course Objectives.....	3
Required Materials and Texts	3
Class Format.....	3
Course Evaluation – Overview.....	4
Course Evaluation – Details.....	5
Participation (30%)	6
Case Decision Assignments (15% each), due Oct. 07, 2021 and Nov. 04, 2021	6
Case Breif (15%) due November 22, 2021	6
Final Take Home Exam (25%) due December Exam Period.....	6
Introduction to the Discipline of Law	
Week 1 (September 7,9).....	6
Week 2 (September 13,14,16).....	6
Week 3 (September 20,21,23).....	6
Week 4 (September 27,28,30).....	7
Constitutional Law	
Week 5 (October 4,5,7)	7
Week 6 (No Class – Reading Week)	7
Week 7 (October 18,19,21)	8
Week 8 (October 25,26,28)	8
Week 9 (November 1,2,4).....	8
Administrative Law	
Week 10 (November 8,9,11).....	8
Week 11 (November 15,16,18).....	9
Week 12 (November 22,23,25).....	9

Week 13 (Nov 29,30, Dec 2)	9
Week 14 (December 6,7,9).....	9
Course Policies	9
Submission of Assignments.....	Error! Bookmark not defined.
Grades.....	9
Late Assignments	10
Absences, Missed Work, Illness	10
Courses With An On-Line Element.....	10
Online Proctoring.....	11
Authenticity / Plagiarism Detection	11
Copyright and Recording	12
Academic Accommodation for Religious, Indigenous or Spiritual Observances (RISO)	13
Academic Integrity Statement.....	13
Conduct Expectations.....	13
Academic Accommodation of Students with Disabilities.....	14
Faculty of Social Sciences E-mail Communication Policy	14
Course Modification	14
Extreme Circumstances.....	14

Course Description

This course is intended to give students a greater understanding of the interaction between law and politics and how the law more broadly mediates and structures the relationship between government and citizens. Specifically, this course examines these interactions from the perspective of constitutional, administrative and human rights law in Canada by considering law as both the output of political action and as the structure in which political action occurs.

To develop this understanding, students will be introduced to the historical, philosophical and theoretical aspects underlying basic legal concepts and legal reasoning as they relate to constitutions, the rule of law, an independent judiciary, and the administrative state. The course begins with a broad overview of competing conceptions of law as a base to an extensive investigation of the development, interpretation and evolution of Canadian public law. This preliminary focus will set the stage for a more intensive review of major contemporary issues that fall somewhere in the middle between law and politics including delegated authority and administrative tribunals, competing sources of law, the role of courts, the division and separation of powers, human rights law, and the challenges of quasi-constitutionality. Particular attention will be given to administrative law.

Students will also develop basic legal research skills as they will learn to find, read, distinguish and summarize judicial and administrative decisions using CanLii. This will further advance critical thinking, literacy, communication and global understanding skills.

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;
- 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

This course does not use a specific textbook but rather relies on various readings and case law (as detailed below) which are available through the McMaster University

libraries, Google Scholar and CanLii. Most readings and cases used for this course will also be made available to students through Avenue to Learn.

Please note that the readings are optional and designed to provide further introduction and background to the relevant course material. They are for information only and will only be partially related to assessable course content.

Class Format

This course is scheduled for three 50-minute sessions per week. The class will be delivered remotely through a virtual Zoom classroom. Lectures will be conducted through synchronous sessions using Zoom during regularly scheduled class times on **Monday, and Thursdays** from **3:30pm to 4:20pm** and on **Tuesdays** from **4:30pm to 5:20pm**.

As with the limited options available in the world of remote learning, there are strengths and weaknesses to synchronous and asynchronous elements of learning. While an asynchronous style gives students more flexibility and may offer a different engaging learning experience, this material is best learned through discussion and interactive learning. In my experience, both students and the instructor have found it more engaging to participate on a more immediate level. This helps foster social connections between instructors and students in the best way possible given the current circumstances. While Covid-19 means that we can't be together (now), it would be a disservice to entirely eliminate the important dialogue and interactions that occurs when learning and talking about legal issues such as those that will be discussed in this course. In order to better enhance your learning experience, students will engage in discussion in smaller groups through breakout rooms. As a means to engage with the class as a whole, the instructor will also make use of polls through the Zoom feature and on "Microsoft Forms" as they are included and will not force students to endure any additional costs. These methods will also assist in determining participation grades.

The instructor is mindful of the challenges that may arise when it comes to synchronous learning. Issues that may occur include technological challenges such as accessing the internet and inflexible schedules for people across different times zones, or with caregiver and other responsibilities. For these reasons the instructor is sympathetic and will do his best to mitigate issues. Solutions to reasonably foreseeable issues such as those mentioned above may include recording the Zoom lectures and posting power point lecture slides on Avenue to Learn. Please note that only the "Main Room" where lectures will take place may be recorded and posted since the synchronous sessions are subject to testing on the exam.

Since the course content and all assessable material will be delivered synchronously (live virtual lectures using Zoom), it is important that students keep up with the current course schedule and make every effort to attend class.

Avenue to Learn will be the main source of communication between the instructor and the class. Updates on course content, assignments and the class in general will be posted

using the announcement feature. Additional communication may take place using the appropriate McMaster email system. The instructor may make use of other outlook features such as the calendar and “One Drive” as a way to further organize correspondence. As some students may not be already familiar with these systems, the instructor will provide a brief tutorial on how to access and use these online tools.

Students are kindly reminded to follow “Netiquette” guidelines and conduct themselves in a respectful manner at all times when dealing with the instructor or other fellow students. Please refer to the “Guidelines for UG Classroom” and the “Student Support & Case Management Office Netiquette Resource” for further information.

<https://socialsciences.mcmaster.ca/staff-faculty-resources/teaching/>

Note Regarding Disturbing Content: When we deal with law and justice, we are sometimes dealing with troubling and disturbing issues. Some of the cases, for example, might be upsetting. Presenting the material in their original form is often necessary in order to provide an accurate depiction of the realities of some of the complex issues around law and politics. If you find material as they are presented to be upsetting and are finding it difficult to discuss them in class, please let the instructor know and he will find an accommodation to address your concerns.

Course Evaluation – Overview

1. Participation	30%	Weekly
2. Case Decision Assignments	15% each	Oct. 7, 2021 Nov. 4, 2021
3. Case Brief Assignment	15%	Nov.22, 2021
4. Final Exam	25%	December Exam Period

Course Evaluation – Details

Participation (30%)

Participation in this class accounts for 30% of the final grade and will be assessed on an ongoing basis. Participation marks will be determined exclusively by responses to poll questions during class. It is highly important that students attend class in order to receive full participation grades as they will not be granted access to the questions after class.

Please note that reports on attendance during class are made readily available. Information on the duration that students stay during class is accessible and will assist the instructor in making final decisions about participation grades. To receive full participation marks students must answer all questions that are presented during virtual class times.

Case Decision Assignments (15% each), due October 7, 2021, and November 4, 2021.

Students will submit two (2) two to three (2-3) page maximum papers as outlined on the specific assignment instructions and based on a hypothetical set of facts associated with a Supreme Court of Canada case dealing with one of the four major components of the course – judicial independence or the rule of law, administrative law and constitutional law. Students will be asked to write a judicial decision of their own concerning a hypothetical set of facts with an application of the appropriate law as set out in the lecture content.

Case Brief Assignment (15%), due November 22, 2021

In order to complete this assignment, students will locate, summarize and assess various public law decisions in Canada using the legal research engine CanLii. Further details about this assignment will be discussed in class. The skills associated with this assignment are especially valuable to students pursuing law school in the future.

Weekly Course Schedule and Required Readings

Week 1 (September 7,9)

Course Introduction – Law and Politics

Readings:

INTRO TO THE DISCIPLINE OF LAW

Week 2 (September 13,14,16)

What is Public Law

Readings:

Loughlin, M. 2000. "Politics and Law" in *Swords and Scales: An examination of the relationship between law and politics*. Bloomsbury Publishing, Chapter 1

Loughlin, M. 2000. "Ways of World Making" in *Swords and Scales: An examination of the relationship between law and politics*. Bloomsbury Publishing, Chapter 2

Week 3 (September 20,21,23)

Sources and Systems of Law

Readings:

Fuller, L.M. 1964. "The morality that makes law possible" in *The Morality of Law*. Chapter 2 (p. 33 - 41 only)

Week 4 (September 27,28,30)

Organization and Institutions of Law

Readings:

Macfarlane, E. 2012. "The Evolution of the Court and its Justices" in *Governing from the bench: The Supreme Court of Canada and the judicial role.*, pp. 39-69

McLachlin, B. 2006. "Academe and the Courts: Professor Mullan's Contribution" in *Inside and outside Canadian administrative law: essays in honour of David Mullan.*, (p. 9 - 20 only)

Bingham, T. 2011. "The importance of the Rule of Law" in *The Rule of Law.*, (p. 3 - 30 only)

Hogg, P., Zwibel, C. "The Rule of Law in the Supreme Court of Canada" *University of Toronto Law Journal*, Summer 2005 vol. 55, no 3., pp. 715-732

CONSTITUTIONAL LAW

Week 5 (October 4,5,7)

Constitutions, Judicial Federalism and Jurisdiction

Readings:

Roach, K. 2018. "The Judicial, Legislative and Executive Roles in Enforcing the Constitution: Three Manitoba Stories" in *Canada in the World: Comparative Perspectives on the Canadian Constitution* Edited by Richard Albert and David Cameron., pp. 264-302

Barber, N.W. 2018 "The Separation of Powers" in *The Principles of Constitutionalism.* Oxford University Press., p. 51-83

Laskin, B. 1967. The Canadian constitution after the first century. *Saskatchewan Law Review*, 32(3), 159-165.

CASE DECISION ASSIGNMENT #1 Due! – OCT.7, 2021

Week 6 – No Class – Reading Week

Week 7 (October 18,19,21)

Judicial Federalism and the JCPC

Readings:

Laskin, B. 1967. The Canadian constitution after the first century. *Saskatchewan Law Review*, 32(3), 159-165.

Week 8 (October 25,26,28)

The Evolution of Judicial Federalism from the JCPC to the SCC

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 (November 1,2,4)

The SCC and POGG

Readings:

Hogg, P. W., & Wright, W. K. (2005). Canadian federalism, the privy council and the supreme court: Reflections on the debate about Canadian federalism. *U.B.C. Law Review*, 38(2), 329-352.

CASE DECISION ASSIGNMENT #2 Due! – NOV.4, 2021

ADMINISTRATIVE LAW

Week 10 (November 8,9,11)

Administrative Law and The Administrative Justice System

Readings:

Lorne Sossin, "The Wonders of Administrative Law"

Bob Tarantino, "Banal Injustice," *Literary Review of Canada* pp.

Liston, M. (2012). Governments in miniature: the rule of law in the administrative state. *Administrative Law in Context, 2d ed (Toronto: Emond Montgomery, 2013)* (78- 80 and 87-97only)

Week 11 (November 15,16,18)

Administrative Tribunals: Regulation, Delegation and Governance

Readings:

Houle, F., & Sossin, L. (2006). Tribunals and guidelines: Exploring the relationship between fairness and legitimacy in administrative decision-making. *Canadian Public Administration*, 49(3), 282-307.

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

Jacobs, L. (2008). The Expert Tribunal. *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007)*, 67-92.

Week 12 (November 22,23,25)

Judicial Oversight: Tribunals and the Courts I

Readings:

McLachlin, C.J., "Administrative Tribunals and the Courts: An Evolutionary Relationship" (<http://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>)

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

CASE BRIEF ASSIGNMENT DUE! NOV.22,2021

Week 13 (Nov 29,30, Dec 2)

Judicial Oversight: Tribunals and the Courts II

Readings:

Chatterjee, A. 2008. Analyzing Problems of Exclusive and Concurrent Jurisdiction. *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007)* pp. 333- 372

Week 14 (December 6,7,9)

Conclusion and Exam Preparation

Course Policies

Submission of Assignments

Assignments should be submitted to the drop box on Avenue to Learn by the respective due date. Papers received by e-mail or any other means other than through submission

on Avenue to Learn will not be accepted without the prior express permission of the instructor on each specific 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. If 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.

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 (i.e. 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 class 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 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.

Courses with an On-Line Element

Some courses may use on-line elements (e.g. e-mail, Avenue to Learn (A2L), LearnLink, web pages, capa, Moodle, ThinkingCap, etc.). Students should be aware that, when they access the electronic components of a course using these elements, 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 a course that uses on-line elements will be deemed consent to this disclosure. If you have any questions or concerns about such disclosure please discuss this with the course instructor.

Online Proctoring

Some courses may use online proctoring software for tests and exams. This software may require students to turn on their video camera, present identification, monitor and record their computer activities, and/or lock/restrict their browser or other applications/software during tests or exams. This software may be required to be installed before the test/exam begins.

Authenticity / Plagiarism Detection

Some courses may use a web-based service (Turnitin.com) to reveal authenticity and ownership of student submitted work. For courses using such software, students will be expected to submit their work electronically either directly to Turnitin.com or via an online

learning platform (e.g. A2L, etc.) using plagiarism detection (a service supported by Turnitin.com) so it can be checked for academic dishonesty.

Students who do not wish their work to be submitted through the plagiarism detection software must inform the Instructor before the assignment is due. No penalty will be assigned to a student who does not submit work to the plagiarism detection software. **All submitted work is subject to normal verification that standards of academic integrity have been upheld** (e.g., on-line search, other software, etc.). For more details about McMaster's use of Turnitin.com please go to www.mcmaster.ca/academicintegrity.

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, usernames 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](#).

Copyright and Recording

Students are advised that lectures, demonstrations, performances, and any other course material provided by an instructor include copyright protected works. The Copyright Act and copyright law protect every original literary, dramatic, musical and artistic work, **including lectures** by University instructors

The recording of lectures, tutorials, or other methods of instruction may occur during a course. Recording may be done by either the instructor for the purpose of authorized distribution, or by a student for the purpose of personal study. Students should be aware that their voice and/or image may be recorded by others during the class. Please speak with the instructor if this is a concern for you.

Academic Accommodation for Religious, Indigenous or Spiritual Observances (RISO)

Students requiring academic accommodation based on religious, indigenous or spiritual observances should follow the procedures set out in the [RISO](#) policy. Students should submit their request to their Faculty Office **normally within 10 working days** of the beginning of term in which they anticipate a need for accommodation or to the Registrar's Office prior to their examinations. Students should also contact their instructors as soon as possible to make alternative arrangements for classes, assignments, and tests.

Academic Integrity Statement

You are expected to exhibit honesty and use ethical behaviour in all aspects of the learning process. Academic credentials you earn are rooted in principles of honesty and academic integrity. **It is your responsibility to understand what constitutes academic dishonesty.**

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 behaviour 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. For information on the various types of academic dishonesty please refer to the [Academic Integrity Policy](#), located at <https://secretariat.mcmaster.ca/university-policies-procedures-guidelines/>

The following illustrates only three forms of academic dishonesty:

- plagiarism, e.g. the submission of work that is not one's own or for which other credit has been obtained.
- improper collaboration in group work.
- copying or using unauthorized aids in tests and examinations.

Conduct Expectations

As a McMaster student, you have the right to experience, and the responsibility to demonstrate, respectful and dignified interactions within all of our living, learning and working communities. These expectations are described in the [Code of Student Rights & Responsibilities](#) (the "Code"). All students share the responsibility of maintaining a positive environment for the academic and personal growth of all McMaster community members, **whether in person or online.**

It is essential that students be mindful of their interactions online, as the Code remains in effect in virtual learning environments. The Code applies to any interactions that adversely affect, disrupt, or interfere with reasonable participation in University activities. Student disruptions or behaviours that interfere with university functions on online platforms (e.g. use of Avenue 2 Learn, WebEx or Zoom for delivery), will be taken very

seriously and will be investigated. Outcomes may include restriction or removal of the involved students' access to these platforms

Academic Accommodation of Students with Disabilities

Students with disabilities who require academic accommodation must contact [Student Accessibility Services](#) (SAS) at 905-525-9140 ext. 28652 or sas@mcmaster.ca to make arrangements with a Program Coordinator. For further information, consult McMaster University's [Academic Accommodation of Students with Disabilities](#) policy.

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.

Extreme Circumstances

The University reserves the right to change the dates and deadlines for any or all courses in extreme circumstances (e.g., severe weather, labour disruptions, etc.). Changes will be communicated through regular McMaster communication channels, such as McMaster Daily News, A2L and/or McMaster email.