

CONSTITUTIONAL AND PUBLIC LAW IN CANADA

Spring 2021

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Lecture: Mon. & Wed. 6:30pm - 9:30pm

Room: Virtual Classroom – Zoom

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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. However, the course will also examine some of these concepts within the context of contemporary issues such as the current global Covid-19 pandemic and the Supreme Court's recent decision on the federal government's carbon tax.

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. Students can expect to more fully appreciate the wide scope of Canadian legal phenomena and be able to better situate it within our politics and governing institutions.

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.

The readings are categorized into two fields: **Mandatory** and **Additional**. Students are expected to come to class prepared by completing the mandatory readings. Additional readings are designed to provide further information and background to the relevant course material. Students are encouraged to also use them in addition to the mandatory readings to assist in completing certain assessments.

Please note: All mandatory readings will be partially related to assessable course content. This means that while they are important, relying solely on the readings without building on material discussed in class will yield insufficient results on assessments like the exam.

Class Format

This course will be delivered remotely through a virtual classroom. Lectures will be conducted through synchronous sessions using Zoom during regularly scheduled class times on **Monday** and **Wednesday** from **6:30pm** to **9:30pm** beginning on **Monday May 3, 2021**. Please note that while class is scheduled for two three-hour session per week, the instructor may choose to limit some classes to only two-hours to help students avoid screen fatigue. In those instances, the third hour will be used at the discretion of the instructor to clarify and answer questions related to course content and give students the opportunity to catch up on academic work related to the course.

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

Participation	15%	
Reflection Note (1 page)	5%	May 05, 2021
Public Law Reaction Paper (5-7)	15%	May 21, 2021
Legal Research Assignment	25%	June 04, 2021
Take-Home Exam	40%	June 16, 2021

Course Evaluation – Details

Participation (15%)

Participation accounts for 15% of the final grade and will be assessed on an ongoing basis. Participation marks will be determined by the frequency of responses to poll questions and level of engagement during class and breakout rooms. The instructor is mindful that public speaking – especially through virtual platforms – may be stressful for some. It is for this reason that participation grades will primarily be assessed through responses to questions presented through polls. Students will not be able to participate unless they come to 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.

Reflection Note (5%), due May 05, 2021

Students are required to submit a brief 1 (one) page reflection on what law means to them. Students will provide a response to the question: **What is law and what does it mean to you?** This short assignment is not meant to be argumentative. Students should consider this an opinion piece and are encouraged to reflect on the question by providing honest commentary on what they think “law” means. Students will be graded on whether or not they submit the assignment and follow clear instructions. This brief one-page assignment must: (1) be single spaced, (2) typed in 12-point Times New Roman font, (3) include a title, (4) include your name, student number, date and the name of the instructor on the top left-hand corner, and (5) have at least 2 (two) paragraphs. A title page is not necessary. The reflection note is due before the second class on **Wednesday May 5, 2021 before 11:59am EST (noon)**.

Public Law Reaction Paper (15%), due May 21, 2021

Each student will identify 1 (one) relatively recent newspaper/mainstream media article that reflects an issue that is relevant to Canadian public law – be it constitutional, administrative or criminal. Students will write a **short reaction paper (5 to 7 pages)** based on their selected article.

The paper must include the following elements: Title and bibliographic reference of the newspaper article that you have chosen; a brief explanation of the issue in question in your chosen article (i.e., what is this article about?), and most important, an assessment of how the article you have chosen is relevant to this course. In other words, students should provide an explanation of how the article outlines some aspect of public law which will involve making reference to some of the key concepts and/or theories discussed in class and identified in the course readings. Students should consider the assessment portion of

this assignment as their analytical component as the paper *must* demonstrate some insight and include an argument.

In order to do exceptionally well on the paper (i.e., receive a grade higher than a “B-”) students must go beyond simply *describing* why the issues are related to public law. Students should be able to draw on course material and develop original insight/arguments about the public law-related issue raised in the selected article. This may involve answering questions about how the article contributes to our understanding of law in Canada.

The public law reaction paper will be graded on five components.

1. Whether there is a rational connection between the selected newspaper article and course-related content
2. How well the paper describes and outlines the issues in question in the chosen article
3. The level of analysis in the paper
4. Clarity of the argument
5. Writing quality

Legal Research Assignment (25%), due June 04, 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.

Final Take-Home Exam (40%), due June 16, 2021

The final take home exam will be based on all the materials discussed throughout the course. Special attention will be given towards material discussed in the latter half of the course with a focus on administrative and human rights law.

Weekly Course Schedule and Required Readings

Week 1 - May 03, 2021 – Course Introduction

Topic - Law and Politics

Readings: *None*

Week 2 - May 05, 2021 – Unit 1: Introduction to the Discipline of Law

Topic – What is Law?

Readings:

Mandatory

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

****Note: Reflection Note Assignment Due on May 05, 2021 by 12:00pm****

Week 3 - May 10, 2021 – Unit 1: Introduction to the Discipline of Law

Topic – Sources and Systems of Law

Readings:

Mandatory

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

Week 4 - May 12, 2021 – Unit 1: Introduction to the Discipline of Law

Topic – Organization and Institutions of Law

Readings:

Mandatory

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)

Additional

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

Week 5 - May 17, 2021 – Unit 2: Constitutional Law

Topic – Constitutions, Judicial Federalism and Jurisdiction

Readings:

Mandatory

Hasbe, Y. and Cesare, P. 2013. “Constitutions” in Mark Tushnet, Thomas Fleiner and Cherul Saunders (eds.) *The Routledge Handbook of Constitutional Law.*, p. 9-19.

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

Additional

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.

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.

Week 6 - May 19, 2021 – Unit 2: Constitutional Law

Topic – POGG, Covid-19 and The Environment

Readings:

Mandatory

None

Additional

Laskin, B. (1947). Peace, order and good government re-examined. *Canadian Bar Review*, 25(10), 1054-1087.

****Note: Public Law Reaction Paper Assignment Due May 21, 2021 by 11:59pm EST****

Week 7 – May 24, 2021 – Victoria Day

No Class

Week 8 - May 26, 2021 – Unit 3: Administrative Law

Topic – Administrative Law and The Administrative Justice System

Readings:

Mandatory

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

Lorne Sossin, "The Wonders of Administrative Law"

Additional

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

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.

Week 9 - May 31, 2021 – Unit 3: Administrative Law

Topic – Administrative Tribunals: Regulation, Delegation and Governance

Readings:

Mandatory

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

Additional

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

Week 10 - June 02, 2021 – Unit 3: Administrative Law

Topic – Judicial Oversight: Tribunals and the Courts

Readings:

Mandatory

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.

Additional

Bell, J. 2019. "Judicial Review in the Administrative State" in *Judicial review of administrative discretion in the administrative state* edited by De Poorter, J., Ballin, E. H., & Lavrijssen, S. (Eds.). TMC Asser Press., pp. 3-25

Sossin, L. 2002. Discretion unbound: Reconciling the Charter and soft law. *Canadian Public Administration*, 45(4), 465-489.

****Note: Legal Research Assignment Due June 04, 2021 by 11:59pm EST****

Week 11 - June 07, 2021 – Unit 4: Quasi-Constitutional Law – Human Rights

Topic – The Problem with Concurrent Jurisdiction: *Tranchemontagne v. Ontario*

Readings:

Mandatory

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 12 - June 09, 2021 – Unit 4: Quasi-Constitutional Law – Human Rights

Topic – *Tranchemontagne v. Ontario Continued*

Readings: *None*

Week 13 - June 14, 2021 – Exam Review

Week 14 - June 16, 2021 – Take Home Exam Due

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. 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.

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, 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 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.