



# Syllabus

## Foundations of Canadian Law

**(Revised April 2018)**

**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 short essay questions, and/or problem questions.

- Short answer questions test candidates' ability to succinctly and correctly 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

- Forcese, Craig *et al*, *Public Law: Cases, Commentary, and Analysis, Third Edition* (Toronto: Emond Montgomery, 2015).  
<http://www.emond.ca/public-law-analysis-cases-and-commentary-3rd-edition.html>
- Required Canadian case law is indicated following each component and is available free of charge from CanLII: <http://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* (Toronto: Emond Montgomery 2014).
- Forcese, Craig & Aaron Freeman. *The Laws of Government: The Legal Foundations of Canadian Democracy, Second Edition* (Toronto: Irwin Law, 2011) - publication details at <http://www.irwinlaw.com/store/product/656/the-laws-of-government--the-legal-foundations-ofcanadian-democracy-second-edition>
- Forsey, Eugene A. *How Canadians Govern Themselves, 8th ed.* (Ottawa: Library of Parliament, 2012) (online)  
<http://www.parl.gc.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, 2017 Student Edition* (Toronto: Thomson Carswell, 2016).
- Justice Canada, “Canada’s System of Justice”- <http://www.justice.gc.ca/eng/csi-sjc/just/>
- 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, Craig, Chapter 2

Faisal Bhabha, "Islands of Empowerment: Anti Discrimination Law and the question of racial emancipation" (2013) 31 *Windsor Yearbook of Access to Justice* 39:

<https://ojs.uwindsor.ca/ojs/leddy/index.php/WYAJ/article/view/4412/3615>

Scott Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed":

<https://ssrn.com/abstract=968657>

Lisa M. Kelly, "The Work of Ideology in Canadian Legal Thought" (2016) 74 *SCLR* (2d) 27: [https://www.academia.edu/28697707/The\\_Work\\_of\\_Ideology\\_in\\_Canadian\\_Legal\\_Thought](https://www.academia.edu/28697707/The_Work_of_Ideology_in_Canadian_Legal_Thought)

### 2. Indigenous Peoples and the Law

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

#### A. Required Readings:

Forcese, Craig, 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](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>



The following **two** excerpts **only** (from *UNDRIP Implementation* below):

- i) Oonagh Fitzgerald and Risa Schwartz, “Introduction”; **and**
- ii) Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult”, **from**

*UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws – Special Report*, ed. J. Goyder, Centre for International Governance Innovation (2017):

[www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf](http://www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf)

Current Status of Bill C262: An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples:

<https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8160636&Language=E>

Thomas Isaac and Arend J.A. Hoekstra, “Implementing UNDRIP in Canada: Challenges with Bill C-262”:

[www.casselsbrock.com/CBNewsletter/Implementing\\_UNDRIP\\_in\\_Canada\\_Challenges\\_with\\_Bill\\_C\\_262?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://www.casselsbrock.com/CBNewsletter/Implementing_UNDRIP_in_Canada_Challenges_with_Bill_C_262?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original)

Meeting of the Standing Committee on Indigenous and Northern Affairs, Tuesday March 27, 2018, **read Evidence by Perry Bellegarde and Craig Benjamin, from 16:05 to 16:50 in the transcript:** [www.ourcommons.ca/DocumentViewer/en/42-1/INAN/meeting-100/evidence](http://www.ourcommons.ca/DocumentViewer/en/42-1/INAN/meeting-100/evidence)

Alicia Elliot, “A Memo to Canada: Indigenous People are not Your Incompetent Children” *The Globe and Mail*, January 5, 2018: [www.theglobeandmail.com/opinion/indigenous-memo-to-canada-were-not-your-incompetent-children/article37511319/](http://www.theglobeandmail.com/opinion/indigenous-memo-to-canada-were-not-your-incompetent-children/article37511319/)

**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 Inc.*, [2017] 1 SCR 1099

*Canada v. Mikisew Cree First Nation*, 2016 FCA 311

**C. Required Readings Re: Aboriginal Title:**

*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, 2005 SCC 43 [2005]

**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, Craig, Chapter 4

Marie-Claude Gervais and Marie-France Seguin, "Some thoughts on Bijuralism in Canada and the World" (2001) Department of Justice Canada

<http://payequityreview.gc.ca/eng/rp-pr/csj-sic/harmonization/hfl-hlf/b2-f2/bf2.pdf>

*Grimard v. Canada* [2009] FCA 47 <http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/36311/index.do>

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

<https://mjlh.mcgill.ca/issues/volume-10-issue-1-101-special-issue-2016/precedent-revisited-carter-v-canada-ag-and-the-contemporary-practice-of-precedent/>

Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012) 111 Michigan Law Review 1:

<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1095&context=mlr>

Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2(1) CJCL 261: <http://www.cjcl.ca/wp-content/uploads/2016/08/A7.-Hudson-Alastair-Conscience-as-an-Organizing-Concept-for-Equity.pdf>

*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (**skim 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) <http://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**



#### **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, Craig, Chapter 5

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

#### **5. Parliament and its Components**

- The Monarch and Governor General
- Senate
- House of Commons

Required Readings:

Forcese, Craig, Chapter 6

Barnes et al., “Reforming the Senate of Canada: Frequently Asked Questions”,  
Background Paper, Library of Parliament (2011)

<http://www.parl.gc.ca/content/lop/researchpublications/2011-83-e.pdf>

*Singh v. Attorney General of Quebec*, 2018 QCCA 257

#### **6. Functions of Parliament**

- Summoning
- Prorogation
- Dissolution
- Key Actors
- Parliamentary Procedure and Law-Making



Required Readings:

Forcese, Craig, Chapter 7

**7. The Executive and its Functions**

- The Functions of the Executive
- Sources of Executive Power
- Executive Institutions and the Political Executive

Required Readings:

Forcese, Craig, Chapter 8

**8. The Courts and the Judiciary**

- Structure of the Canadian Court System
- Judicial Appointments
- Judicial Independence

Required Readings:

Forcese, Craig, Chapter 9

Elaine Craig, “Judging Sexual Assault Trials: Systemic Failure in the Case of *Regina v. Bassam Al-Rawi*” 2017 CBR, Vol 95:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2949992](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2949992)

Alice Woolley, “The Resignation of Robin Camp: Background and Reflections”,

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2982021](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982021)

**9. Statutory Interpretation**

- Approaches to Interpretation
- The Modern Approach to Interpretation

Required Readings:

Forcese, Craig, Chapter 10, pp.425-480; 506-518

*Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313





## 10. Constraints on Legislative and Administrative Action

- Judicial Review in a Democratic Society
- Judicial Review of Administrative Action

### Required Readings:

Forcese, Craig, Chapter 11

*Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257

<http://www.canlii.org/en/ca/fca/doc/2016/2016fca257/2016fca257.html>

David Stratas: “The Canadian Law of Judicial Review: A plea for Doctrinal coherence and consistency” (2016):

[https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2733751](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2733751)

Lorne Sossin, “Dunsmuir – Plus ça change Redux” (2018):

[www.administrativelawmatters.com/blog/2018/03/07/dunsmuir-plus-ca-change-redux-lorne-sossin/](http://www.administrativelawmatters.com/blog/2018/03/07/dunsmuir-plus-ca-change-redux-lorne-sossin/)

Naiomi Metallic, “Deference and Legal Frameworks Not Designed By, For or With Us” (2018): <http://www.administrativelawmatters.com/blog/2018/02/27/deference-and-legal-frameworks-not-designed-by-for-or-with-us-naiomi-metallic/>



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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](http://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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