

**FACULTY OF LAW UNIVERSITY OF BRITISH COLUMBIA
LAW 505 - CANADIAN PUBLIC LAW**

Summer 2023,
June 20-July 20,
Tuesdays and Thursdays, 9:00 a.m. – 12:30 p.m. and 2:00 p.m. – 5:00 p.m.
Allard Hall, Room 104

Instructor: Robert Danay rdanay@mail.ubc.ca

About the Course:

Welcome to Law 505, Canadian Public Law. This is a graduate level course for students enrolled in the course based Masters of Law (Common Law) program at UBC. In broad terms, this course surveys the foundations of the Canadian legal system as well as the basic principles of Canadian constitutional law.

This course will cover four main topics:

1. Fundamental principles of Canadian public law including the rule of law, sources of Canadian law, principles of statutory interpretation and the structure of courts in Canada;
2. The nature and sources of the Canadian constitution and the distribution of powers in Canada as between the federal and provincial governments;
3. The *Canadian Charter of Rights and Freedoms*;
4. The relationship of Aboriginal Peoples to the Canadian State.

Each section will encourage students to think critically about the Canadian legal system. By the end of the course, students will:

- understand key legal doctrines and the basic principles that inform them;
- understand the sources of Canadian law and the historical context in which it was established;
- be able to apply legal analysis to specific constitutional problems and issues; and
- develop their own understanding of how Canadian public law regulates the Canadian social and political orders and how it contributes to the construction of the Canadian national identity.

Class will meet **Tuesdays and Thursdays from 9-12:30 and 12:30 pm – 5 pm** in Allard Hall, Room 104. The final exam will take place on **July 25 at 9:00 a.m.** in Allard Hall Room 104 (Room 115 for hand-writers).

The course will be taught through a combination of presentations by the instructor, class discussions and small group exercises. Students are expected to attend class regularly, to have completed the assigned readings for each class and to participate in class discussions, which will be interactive. In discussion, the emphasis will be on developing a critical understanding of the material, and as such students are strongly encouraged to reflect on the material and form their own views on the law and

related policy issues before the class. The course will also provide students with opportunities to engage in problem-solving exercises in class, and to develop their legal writing skills.

About the Instructor:

I am a practising lawyer with the Government of British Columbia's Ministry of the Attorney General in Vancouver. As a government litigator, I have represented the provincial and federal governments in a wide variety of high profile cases at all levels of court in Canada. I earned a B.Sc. from the University of Toronto, an LL.B. from the Osgoode Hall Law School and a B.C.L from the University of Oxford. I clerked for the Deputy Chief Justice of the Constitutional Court of South Africa. Aside from Canadian Public Law, I have taught courses ranging from Law and Technology, Administrative Law, Torts and the Law of Evidence both at the Allard School of Law as well as at the University of New Brunswick Faculty of Law. I am a co-creator of *Stereo Decisis*, a legal themed podcast and have published scholarly articles on topics ranging from internet defamation to the standard of review in administrative law in journals such as the McGill Law Journal, University of Toronto Law Journal, University of British Columbia Law Journal, Yale Journal of Law and Technology, Hong Kong Law Journal, and the South African Journal on Human Rights.

The best way to communicate with me is through email at: rdanay@mail.ubc.ca. I do not intend to hold regular office hours, but will be available to meet with students on an as needed basis. I will try to ensure that I can be available outside of class at convenient times to answer questions or discuss the material.

Grades / Evaluation:

Students will be evaluated using the following three assessments:

1. Quizzes, which may be administered during most classes – worth 20% of the final grade;
2. Take home memorandum assignment – worth 30% of the final grade;
3. Final examination (open book) – worth 50% of the final grade.

Although attendance lists will not be taken, students are expected to attend all lectures in this course. Students should arrive on time for the scheduled lecture, and try to avoid disrupting the class by leaving early.

The take home memorandum assignment will simulate a typical research assignment that might be given to an articling student or junior lawyer. It will involve a fact scenario and a series of questions that will test your knowledge of the concepts and materials covered so far in the course and your ability to apply them to a particular situation. The assignment will be **distributed in class on June 29, 2023** and will be **due on July 6, 2023** at 5pm (please email the assignments to rdanay@mail.ubc.ca). The assignment will have a maximum word count of 2500 words (including footnotes), as well as certain formatting requirements.

Late assignments will be penalized according to Allard Law School policies. For each or any part of a day that the assignment is late, including weekends and statutory holidays and other days when the law school is closed, the student will lose 5% of the maximum possible value of the assignment for the first day or part of a day that the assignment is late and an additional 2% for each subsequent day or part of a day.

The final examination (worth 50% of the final grade) will be an open book examination, which means that students may bring in their notes, textbooks or any other (hard copy, printed) materials to consult during the exam. It will be held on **Tuesday, July 25, 2022 at 9:00 AM.**

The exam will consist of short answer questions, short essay questions, and/or problem questions. In this regard:

- Short answer questions test students' ability to succinctly and correctly summarize the material listed in the syllabus.
- Problem questions test students' 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.
- Essay questions test whether students have critically engaged with the course material and have started to form their own opinions about the strengths and weaknesses of the arguments, principles, and doctrines discussed in those materials.

The course will be graded according to the Faculty of Law and Faculty of Graduate Studies grading rules. For LLM CL students, the passing grade in any single course is 68%, with an overall average of 70% required to receive the degree.

Faculty rules require that requests for deferment of or accommodation for any assignment or examination be made to the Examinations Committee, not to the individual instructor. If you require assistance with this process, please contact the Graduate Professional Programs Advisor, Tania Astorino: astorino@allard.ubc.ca

All work submitted for this course must be original and may not be or have been submitted in any other course without prior approval by the instructor. Academically recognized practices of citation and attribution must be followed. Never quote or use an idea from another author without citing that person's work. Students should familiarize themselves with the UBC Calendar rules and penalties for plagiarism and other academic offences. <http://vpacademic.ubc.ca/integrity/ubc-regulation-on-plagiarism/>

Course Materials

There are two texts required for this course:

- Craig Forcese et al eds., *Public Law: Cases, Commentary, and Analysis*, (4rd ed.) (Toronto: Emond Montgomery, 2020). This text is referred to in the reading list as "Public Law"; and
- Howard Kislowicz, Jodi Lazare and Robert Danay, *The Canadian Constitutional Law Open Access Casebook*, Canadian Legal Information Institute, [2022 CanLIIDocs 1392](https://www.canlii.org/doc/2022/CanLIIDocs/1392) (online, CanLii.org).

In addition, students should obtain:

- The full text of the Constitution Acts of 1867 and 1982 which can be found on the Department of Justice website at http://laws-lois.justice.gc.ca/eng/Const//Const_index.html;
- Cases as set out on the syllabus which are available free of charge on court websites as set out below or on CanLII: <http://www.canlii.org/>;
- I will circulate lecture videos covering portions of the materials throughout the course.
- I may add or delete from the required reading materials from time to time.

The Class Schedule and Tentative Required Reading List (for Part I of the Course only) are attached as Appendix A. The readings for Parts II-IV will be distributed later.

N.B. The list of required readings may change as the course progresses. You will be notified of any changes to the readings as soon as possible.

Appendix A – Class Schedule and Tentative Required Reading List (for Part I)

Part I – Foundations of Canadian Law

June 20 – Introduction to the Course; Principles and Sources of Canadian Public Law

Introduction to the Course

- a. Introductions / Teaching Philosophy / Course Overview
- b. Components of Public Law
- c. Private Law vs. Public Law

Required Readings:

- Public Law – Chapter 1 – Introduction – pp. 1 – 4
- *Canada (Attorney General) v. TeleZone Inc.*, [\[2010\] 3 S.C.R. 585](#) (Read the “headnote” summary at the beginning as well as paragraphs 24-32).
- CanLii Video Tutorials for Beginners (on YouTube):
<https://www.youtube.com/watch?v=02VpjSryO4I&list=PLEN09msFpx6JD6kn3W5m3qFs-pjB4LmnJ&index=2> (optional only if you already know how to conduct legal research on CanLii).

Sources of Canadian law:

- i. The common law and civil law traditions; bijuralism
- ii. Reception of European law
- iii. Common law method: precedent and equity
- iv. Statutory law
- v. International law

Principles Underpinning Canadian Public Law

- i. Rule of law
- ii. Constitutional supremacy
- iii. Parliamentary sovereignty
- iv. Federalism
- v. Separation of powers

Required Readings:

- Public Law – Chapter 4 – pp. 79-87, 89-94, 97-98, 104-108
- Review the content on bijuralism from the [Department of Justice Website](#).
- The relationship between statutes and the common law: *Coles v. Roach*, [1980 CanLII 2636 \(PE SCTD\)](#).
- The role of precedent, see *Canada v. Craig*, [2012 SCC 43](#); and *Carter et al. v. Canada*, [2015 SCC 5](#) (paras 40-48); *R. v. Vu*, [2004 BCCA 230](#) at paras. 3-11, 15-17, 20-33.
- *R. v. Sullivan*, [2022 SCC 19](#) at paras. 1-6, 73-86.
- *Canada (Justice) v. Khadr*, [\[2008\] 2 SCR 125](#) (paras. 1-8, 15-26) and *Canada (Prime Minister) v. Khadr*, [\[2010\] 1 S.C.R. 44](#) (paras. 1-12, 33-37, 46-48).
- Public Law – Chapter 5 – pp. 110-140, 146-65.

June 22 – Foundations of the Canadian Legal System – The Key Actors

- The role of the Crown
- Parliament and the legislative process:
 - a. The components: the Monarch and Governor General, the House of Commons and the Senate;
 - b. How a bill becomes a law;
 - c. The debate over Senate reform;
 - d. The electoral process: drawing boundaries, policing elections.
 - e. Parliamentary procedure: summoning, proroguing, dissolution.
- Exercise of public power by the executive
 - a. Functions of executive actors;
 - b. Sources of executive power;
 - c. Executive institutions
- Courts and the judiciary
 - a. Structure of the court system;
 - b. Appointment of judges;
 - c. Judicial independence.

Required readings:

- Public Law – Chapter 6 – pp. 175-179, 181- 207, 214-226

- Public Law – Chapter 7 – pp. 227-231
- [Galati v. Canada \(Governor General\), 2015 FC 91](#) (paras. 1-12, 32-48)
- Public Law – Chapter 8 – pp. 289-304, 309-318
- Public Law – Chapter 9 – pp. 345-351, 353-365, 370-380, 396-402
- Rosemary Cairns Way, “[Deliberate Disregard: Judicial Appointments Under the Harper Government](#)” (2014), *Ottawa Faculty of Law Working Paper No. 2014-08*
- [Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21](#)
- Adam Dodek, “[Sex on the Internet and Fitness for Judicial Office: Correspondent's Report from Canada](#)” (2010) 13(2) *Legal Ethics* 215.
- "[Sex, Lies, and Justice Lori Douglas.](#)" *McGill Law Journal Podcast* (19 January 2015).

June 27 – Foundations of the Canadian Legal System – Statutory Interpretation and Judicial Review

- Statutory interpretation
 - a. Dynamic vs. static modes of interpretation
 - b. The “modern approach” to statutory interpretation;
- Judicial review of administrative action
 - a. The duty to be fair
 - b. Substantive review and the standard of review

Required Readings:

- On statutory interpretation, Public Law – Chapter 10 – pp. 408-416, 420-425, 429-458, 488-504.
- Hon. Chief Justice Beverly McLachlin, “Administrative Tribunals and the Courts: An Evolutionary Relationship,” [Supreme Court Website](#).
- On judicial review, Public Law – Chapter 11 – pp. 564-565, 567-584, 590-600

Part II – Constitutional Division of Powers

June 27 – Introduction to the Canadian Constitution; Validity, Applicability and Operability;

Take Home Assignment handed out

- a. Introduction
- b. Validity (characterization of laws, pith and substance, double aspect and necessarily incidental doctrines)
- c. Applicability (a.k.a. interjurisdictional immunity)
- d. Operability (a.k.a. federal paramountcy)
- e. The take home assignment will be handed out and briefly discussed.

June 29 – Division of Powers – Scope of Selected Powers

July 4 – Division of Powers – Scope of Selected Powers

Part III – Canadian Charter of Rights and Freedoms

July 6 – Introduction to the Charter; Limiting Rights and Remediating Breaches

- a. History
- b. How the Courts Interpret the *Charter*
- c. When does the *Charter* apply?
- d. Reasonable limits under s. 1
- e. Overriding breaches under s. 33
- f. Remedies for *Charter* breaches (ss. 24 and 52)

July 11 – Substantive Rights

- a. Freedom of Religion
- b. Freedom of Expression

July 13 – Substantive Rights, con'd

- a. Life, Liberty and Security of the Person
- b. Equality

Part IV – Aboriginal Law

July 18 – Introduction to Aboriginal Law; Aboriginal Rights and Title

July 20 – Course Review; Exam Preparation and Tips

July 25 – Final Exam – 9:00 AM