

ARTSSCI 4CA3 / Legal Inquiry
McMaster University, 2016-17, Term 1; Thursdays, 11:30 -14:20, BSB 238
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Office Hours: 10:30-11:30 AM on selected Thursdays indicated below, C-105F;
immediately after class on other days; or by appointment

A. Introduction

Legal Inquiry aims to demystify law for the curious student of the world. In the brief twelve classes ahead of us, we hope that you will gain a set of skills, and degree of confidence, that will enable you to identify, unearth, and engage with the legal aspects of a social problem. By the end of this course, we hope that you will not feel as though the presence of “law” is any barrier to your understanding of a social issue. On the contrary, we hope that you will view it as a rich source of information and perspective that you can access and engage with in pursuit of greater understanding.

Achieving this basic aim – even merely *articulating* it – exposes a host of other puzzles about the nature of law, legal knowledge, and the legal discipline. For example, when we say “law”, what do we mean? Are there sources of law that do not have to do with the state? Is law a “tool” for effecting social change, and if so, how do we measure success? Does law constrain us? Facilitate us? Where does law come from? What does it mean to think, research, or write in the legal mode?

While this course will not seek to answer these longstanding problems of legal theory, we will seek to identify and begin to explore them when they arise. Inherent in conducting Inquiry-based research is the discovery that questions lead to more questions and that even seemingly definitive answers are contingent and temporary. Law, despite popular images to the contrary, is no different. The answers it appears to provide are never final. This course will introduce you to new information and new ways of thinking. While we hope that you will feel empowered by this new knowledge, we will also encourage you to keep in mind the many questions, problems, and difficulties that lie in the background. All of these new skills, knowledge and confidence should be deployed in a critical spirit. Accordingly, developing the capacity to respond critically to legal materials is an essential objective. This course is equally committed to developing an understanding of both parts of its title, “Legal” and “Inquiry.”

B. Course Description and Overview

The course is loosely structured in three Parts. In Part I (classes 2-5), we explore foundational concepts, structures, and sources of law in Canada. We examine the concept of the Rule of Law and how this concept is actualized in the Canadian context. We will explore key constitutional texts and practice legal reasoning based on these texts. We map out a basic understanding of private law, including common law and codified private law, and explore how formal law influences human behaviour. And we will examine a theory of law, called “critical legal pluralism”, that suggests that the foundation

of law is not the state but rather human interaction. In Part II (classes 6-8), we examine the nature and practice of legal reasoning more explicitly. We introduce you to the system of precedent, reasoning by analogy, and statutory interpretation – techniques for legal decision-making that may be considered “internal” to the legal discipline. Conversely, we examine factors in legal decision-making that arise from external critiques and perspectives. We also introduce you to legal research skills and techniques. Part III (classes 9-11) provides three case studies to exemplify the type of social issues that may be subject to a critical legal inquiry. The concluding class affords an opportunity to actively reflect on, critique, and problematize your learning.

Through its assessments, the course provides an opportunity to engage in experiential legal education by conducting visits to formal and informal sites of law-making; to hone your ability to read and summarize a judicial decision; to write a substantial piece of critical legal scholarship; and to reflect on your evolving conception of law and learning made possible by a liberal arts approach to legal education.

Introduction

Class 1, September 8, 2016: Introduction; hand out instructions on Assignment #1

Part I: Foundations of Canadian Law

Class 2, September 15, 2016: Rule of Law

Class 3, September 22, 2016: The Canadian Constitutional Structure

Class 4, September 29, 2016: Private Law

✓Class 5, October 6, 2016: Customary and Everyday Law

MID-TERM RECESS (NO CLASS ON OCTOBER 13)

Assignment #1 DUE Thursday October 13, 2016 at 4PM via Avenue to Learn

Part II: Legal Research and Reasoning

Class 6, October 20, 2016: Finding sources and statutory interpretation (class held in Wong e-classroom of Mills Library)

✓Class 7, October 27, 2016: Legal Reasoning Inside-Out (case summary instructions handed out in class)

Paper Proposal DUE Sunday October 30th at 6PM via Avenue to Learn

✓Class 8, November 3, 2016: Legal Reasoning Outside-In (**case summary due at the beginning of class via paper submission**)

Part III: Case Studies (Please note: Case Studies subject to modification)

Class 9, **Monday, November 7th, 8:30 AM GS 101** (guest speaker: Thomas McMorrow)
[note change in schedule and different location]

✓Class 10, November 17, 2016: Corporate Social Responsibility

Class 11, November 24, 2016: Intellectual Property and Biotechnology

Conclusion

✓Class 12 – December 1, 2016: Legal Education

Research Paper due Thursday, December 8th at 4PM via Avenue to Learn

Take Home Examination to be accessed on Avenue to Learn at noon on Monday Dec 19th and submitted via Avenue to Learn before noon on Tuesday Dec 20th [24-hour take-home]

✓ indicates a date on which office hours will be held from 10:30-11:30 in C-105F. On other dates, office hours will be held immediately after class. You are always welcome to schedule appointments by phone or skype outside these hours.

C. Course Requirements and Evaluation

You will be graded on the basis of a site visit assignment (25%), a research paper (40%, which includes a mandatory Paper Proposal), and a take-home examination during the examination period (35%, **which grade may be modified according to your performance on a case summary assignment – see below**). Please note that except for the case summary assignment, the grades for each assignment will be assigned as letter grades (A+, A, A-, B+, B, B-, etc.).

Site Visit Assignment (25%): You will be asked to visit two sites of law, one formal and one informal. The written assignment, due **Thursday, October 13th, 2016 at 4PM** via Avenue to Learn, is to describe, reflect upon, and compare your two experiences. Details on the assignment will be provided during the first class.

Case Summary Assignment (High Pass/Pass/Fail): This assignment consists of summarizing one or more judicial decisions. It is due at the beginning of class, in paper, on **Thursday November 3, 2016**. Students who receive a High Pass will receive a “bump” of one grade point to their final examination (e.g., from a B+ to an A-). Students who receive a Fail will receive a decrease of one grade point to their final examination grade (e.g., from a B+ to a B). Students who receive a Pass will experience no change to their examination grade. Full assignment instructions will be handed out in class on October 27th.

Research paper (40%) & Paper Proposal: The main focus of the course is an Inquiry-based research paper in which you **conduct a critical “legal inquiry” into an issue of social relevance** of your choosing. In addition to the paper, which is due on **Thursday, December 8th, 2016 at 4PM** via Avenue to Learn, you must also submit a paper proposal via Avenue to Learn by **Sunday October 30th at 6PM**. That paper proposal should, in three separate sections, address each of the following questions:

1. What is your issue and why is it one of social relevance? There can be no exhaustive definition of what constitutes social relevance: as with anything, relevance is something that should be demonstrated. We invite you to choose a subject matter that is of interest to you and that raises wider societal issues. While in many instances, social relevance will seem self-evident, an essential first step of this assignment is to articulate and argue for the relevance of the issue or question you choose to explore.

2. How is your inquiry a “legal” inquiry? As this course will hopefully illustrate, just what may constitute “law” can be quite broad. Paradigmatic examples of formal law include statutes, regulations, and case law, but other sources of informal law include customs, conventions, policies and procedures, common practices, rituals, and so on. For this course, a “legal” inquiry is one that investigates how law (formal or informal) is being used to address your chosen issue of social relevance. For example, you may focus on a particular legal text and examine its social or cultural consequences. You may examine a particular legal regime and assess how it addresses (or fails to address) your chosen issue. You could examine an example of law reform and discuss the benefits and shortcomings of a particular approach. Or you could show how a judicial decision has understood a particular problem. You could look to problems close to your own life, and how law does, or does not, help address them.

What *critical* perspective do you bring to bear? As an upper-year Arts & Science student, you should be accustomed to bringing a critical perspective to the material you study. Material with a legal element is no different: you should approach it with a critical distance and be prepared to formulate your own independent analysis. A response may be “critical” in a number of ways: You may disagree with a particular policy position as manifested in case law or legislation. You may disagree with a particular choice of governing instrument and propose alternatives. You may identify some injustice or bias or other social problem that occurs as a result of (either incidentally or directly) a given regulatory choice. You may argue for an expanded or narrower understanding of a key concept – such as “law,” “democracy,” or “equality” – as it appears in a given context. These are only examples, of course: the field for critical responses is wide open and invites your creative ideas. In addition to reflecting on these questions, please give an indication of any secondary literature that you have come across that takes a critical approach to your subject matter, and how this approach relates to your own.

Grading: Your final grade for the paper will be the grade assigned by the instructor subject to the following modification (if applicable):

The Paper Proposal will be graded on a pass/fail basis. Proposals that receive a grade of Fail will result in the final paper being downgraded by one grade point (e.g. from an A- to a B+). Proposals that receive a grade of Pass will not affect the grade of the final paper.

Assessment Criteria

The paper will be assessed according to the following criteria:

- Your ability to concisely articulate the central problem of your paper, why it is of social relevance, and the ways in which law intersects with it.
- Your ability to use legal reasoning, as demonstrated in your discussion of the legal elements.
- The extent to which you offer a holistic appraisal of your particular problem, including the consideration of counter-arguments.
- **Special emphasis will be placed on the quality of your critical response to the legal regulation of your chosen issue. In addition, you will be graded on the**

extent to which you have incorporated critical accounts from external sources into your own analysis.

- The effectiveness of the structure, and presentation of your paper.
- The clarity, concision, and elegance of your writing.

Final Examination (take-home examination) (35%)

There will be a 24-hour take home examination that will invite you to reflect on your evolving understanding of law and of inquiry. The exam will be available at **12 noon on Monday, December 19th, 2016** on Avenue to Learn and will be due, via Avenue to Learn, at **12 noon on Tuesday, December 20th, 2016**. Details on the examination will be made available in class.

Policy for Late Submissions

Late submissions will be assigned a penalty of one grade point per day. For example, an assignment that received a grade of A, but that is handed in one day late, will receive an adjusted grade of A-. If it is handed in two days late, it will receive an adjusted grade of B+. We calculate days as follows: each day ends at 11:59 PM, with the exception of the due date, which ends at the time the assignment is due. The first two days are considered as one day for the purposes of late submission. The following hypothetical example illustrates how we calculate days:

Due Date: Monday, October 7th at 4PM via Avenue to Learn

Base grade: A

If handed in between 4:01 PM on October 7th and 11:59PM on October 8th: 1 grade point deduction. Adjusted grade: A-

If handed in between 12:00AM and 11:59 PM on October 9th: 2 grade point deductions. Adjusted grade: B+

If handed in between 12:00 AM and 11:59 PM on October 10th: 3 grade point deductions. Adjusted grade: B

Etc.

Assignment Submission

The written work submission guidelines for this course have been chosen to support the more sustainable use of paper, energy, and toner. Four levels of criteria have been developed by the Office of Sustainability and encouraged for adoption by professors and faculties.

The submission guidelines for this course meet the Platinum standard. All written work must be submitted in the following format:

For all submissions except the case summary assignment:

- Online submission: Please upload your assignments in Avenue to Learn in the format specified in the assignment instructions.
- Please use a sans-serif font.
- Please double space your submission and use margins of 1.5 inches.
- Please do not submit a title page (you may indicate a title to your paper, along with your name and date, at the top of the first page of your paper)
- If extenuating circumstances require you to hand in a hard copy (in which case, please discuss with instructor before submitting), hard copies must be submitted double-sided; in such a circumstances, your paper must have 1.5-spacing (in between single- and double-spacing) and margins that are less than one inch

For the case summary assignment:

- Paper submission: please print double-sided, use 1.5-spacing, a sans-serif font, and margins of 0.75 inches
- No title page

For more information about criteria for sustainable written work submissions, visit the Office of Sustainability website: <http://www.mcmaster.ca/sustainability>.

Unless otherwise indicated in the instructions to the assignment, all assignments should be submitted in **.doc or .docx format**.

Please note: Assignments that do not conform to these specifications are subject to a penalty of one grade point (e.g., from an A to an A-).

D. Course Objectives

The main objective of this course is to equip you with the skills and confidence to incorporate legal analysis into an inquiry of an area of social relevance, and to do so using a critical perspective. It is equally aimed at students who are, and are not, considering studying law as a subsequent degree. For all students, we hope that you will feel that law is an aspect of social life that is accessible to you in your ongoing inquiries, academic or otherwise. Those who decide to pursue the formal study of law may also benefit from entering law school with a set of critical instincts about legal education, legal methodology, and the legal profession. We also hope that by the end of this course you will be able to:

- Understand a legal text (e.g., judicial decision or statute) and identify key passages and relevant information;
- Summarize legal texts and subject them to critical analysis;
- Reflect on some key features of legal reasoning and how they may be distinct from or similar to other types of reasoning you have encountered (e.g., informal logic, the scientific method, social critique, literary theory, etc.);
- Discuss several examples where law intersects with social problems;

- Understand the main insights from legal realism, critical legal studies, law and economics, and socio-legal approaches;
- Reflect on what you have learned about law based on on-site visits to two sites of law-making, one formal, the other informal;
- Identify some positive contributions of law to social problems, and some shortcomings of law's ability to make a difference;
- Reflect on the nature of law as a discipline and its place in interdisciplinary study;
- Develop your own understanding of law and of inquiry, such an understanding to be based on your own iterative self-reflections.

E. McMaster Policy on Academic Integrity

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. 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. 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, located at: <http://www.mcmaster.ca/academicintegrity>.

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 other credit has been obtained. 2) Improper collaboration in group work. 3) Copying or using unauthorized aids in tests and examinations.

F. McMaster Student Absence Form (MSAF)

In the event of an absence, students should review and follow the Academic Regulations in the Undergraduate Calendar “Requests for Relief for Missed Academic Term Work.” Please consult the MSAF statement on our website (<https://artsci.mcmaster.ca/forms-requests/>) and direct any questions or concerns to Shelley Anderson or Rebecca Bishop in the Arts & Science Program Office as appropriate.

G. Email Contact and Student Responsibility Statement

Please Note:

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 students to check their **McMaster email** and course websites weekly during the term and to note any changes.

Announcements will be made in class and by using the course email distribution list.

H. 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 email sas@mcmaster.ca. For further information, consult McMaster University's Policy for Academic Accommodation of Students with Disabilities.

I. 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.

J. Readings and Required Texts

All required texts are made available online via Avenue to Learn. Additional readings, helpful links, and additional resources will be posted on Avenue to Learn.

The required readings for the course are listed below. They are subject to change.

Class 1, September 8, 2016: Introduction
Bruni v Bruni (2010), 104 OR (3d) 254 (SC)

Class 2, September 15, 2016: Rule of Law
AV Dicey, *Introduction to the Study of the Law of the Constitution* (4th ed London 1893) at 173, 176-178, 183-185, 191-193, 334-341.
Roncarelli v Duplessis, [1959] SCR 121 at 130-134, 137-145.

Class 3, September 22, 2016: The Canadian Constitutional Structure
Patrick Monahan, *Constitutional Law*, 2d ed (Toronto: Irwin Law, 2002) at 3-4 ("The Constitution Defined"), 179-80 (Tables 6.1, 6.2 – Canada's Written and Unwritten Constitution)
Reference Re Secession of Quebec, [1998] 2 SCR 217 at paras 32, 49-82.
Constitution Act, 1867, ss 91, 92
Canadian Charter of Rights and Freedoms, ss 1-3, 7-16, 24

Class 4, September 29, 2016: Private Law

Civil Code of Quebec, SQ 1991, c.64, Table of Contents

Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 Am Soc Rev 55

Canada Revenue Agency, "Employee or Self-Employed?"

Class 5, October 6, 2016: Customary and Everyday Law

Roderick A. Macdonald, "Custom Made – For a Non-chirographic Critical Legal Pluralism" (2011) 26 Canadian Journal of Law and Society 301 at 308-315.

Roderick A Macdonald, *Lessons of Everyday Law* (Montreal & Kingston: McGill-Queen's, 2002) at 3-14.

Class 6, October 20, 2016: Finding sources and statutory interpretation

Edwards v Attorney-General For Canada, [1930] AC 124 at 136 (as excerpted in *Canadian Constitutional law*, 3d ed (Toronto: Emond Montgomery, 2003) at 41-45).

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 1-21.

Legal Research Guides Prepared by the Law Librarians at Bora Laskin Law Library (on Avenue to Learn)

Class 7, October 27, 2016: Legal Reasoning Inside-Out

Lon Fuller, "The Case of the Speluncean Explorers" (1949) 62 Harvard Law Review 616 (selected excerpts)

Harrison v Carswell, [1976] 2 SCR 202

Jacobellis v Ohio, 378 US 184 (1964), Justice Stewart (concurring).

Class 8, November 3, 2016: Legal Reasoning Outside-In

Re Drummond Wren, [1945] OR 778, 4 DLR 674 (HCJ)

Re Noble and Wolf, [1948] OR 579, 4 DLR 123 (HCJ)

Class 9, Monday, November 7th, 2016: Assisted Death

Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331

Testimony before the Senate of Canada regarding Bill C-14, re Medical Assistance in

Dying (Peter Hogg, Gerald Chipeur & Thomas McMorrow), available online (at

12:30:20): [http://senparlvu.parl.gc.ca/XRender/en/PowerBrowser/PowerBrowserV2/20160606/-/1/6004?useragent=Mozilla/5.0%20\(Windows%20NT%206.3;%20WOW64\)%20AppleWebKit/537.36%20\(KHTML,%20like%20Gecko\)%20Chrome/50.0.2661.94%20Safari/537.36](http://senparlvu.parl.gc.ca/XRender/en/PowerBrowser/PowerBrowserV2/20160606/-/1/6004?useragent=Mozilla/5.0%20(Windows%20NT%206.3;%20WOW64)%20AppleWebKit/537.36%20(KHTML,%20like%20Gecko)%20Chrome/50.0.2661.94%20Safari/537.36)

Class 10, November 17, 2016: Corporate Social Responsibility

VIDEO:

Mark Achbar, *The corporation, part 1, The pathology of commerce* (Kelowna, B.C.: Film West Associates, 2003) (videorecording)

READING:

John Armour, Henry Hansmann & Reiner Kraakman, "What is Corporate Law" in Kraakman et al, eds, *The Anatomy of Corporate Law: A comparative and functional approach* (Oxford: Oxford University Press, 2009) at 1-3, 5-16

Milton Friedman, "The Social Responsibility of Corporations is to Increase its Profits" *New York Times Magazine*, Sept. 13, 1970, available online: <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>

Class 11, November 24, 2016: Intellectual Property and Biotechnology

Harvard College v Canada (Commissioner of Patents), [2002] 4 SCR 45: headnotes, judgment of Binnie J, SKIM the judgment of Bastarache J (excluding paras 125-142, 147-152)

Class 12 – December 1, 2016: Legal Education

Roderick A Macdonald, *Lessons of Everyday Law* (Montreal & Kingston: McGill-Queen's, 2002) at 17-22

Duncan Kennedy, "Legal Education and the Reproduction of Hierarchy" (1982) 32 *Journal of Legal Education* 591 at 591-600