

## PUBP 898.3: Public Law

	University of Regina Campus	University of Saskatchewan Campus
<b>Instructor:</b>	Not currently offered at U of R	Beth Bilson
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<b>Office Hours:</b>		By appointment
<b>Office Location:</b>		222 College of Law
<b>Term:</b>		Winter 2010
<b>Room:</b>		TBD
<b>Time:</b>		Wednesdays 1:00 – 4:00 p.m.

### CALENDAR DESCRIPTION

This course will introduce students to the fundamental elements of Canadian public law. The first part of the course will focus on the concept of the rule of law, and on the separation of powers under our constitutional system, looking especially at the relationship between the legislature and the courts. This will be followed by a brief consideration of the division of powers between the federal and provincial governments, and the implications of an entrenched charter of rights. The second half of the course will deal with the parameters articulated by the courts for public decision-making, through judicial review, and with the implications of these parameters for the definition of the mandates of decision-makers.

### COURSE CONTENT AND APPROACH

This course is intended to introduce students to the foundational concepts in Canadian public law, and to assist them to explore the implications of these concepts for the definition and design of public decision-making. It is not assumed that students in the course will have prior legal background.

The first section of the course will focus on the ideas of the rule of law and the separation of powers under the Canadian constitution, looking at the concept of parliamentary sovereignty and the respective roles of legislatures executive government and courts in the Canadian constitutional system. The implications of these concepts with respect to the authority and legitimacy of public decision-making in the modern administrative state will be considered.

The course will deal briefly with the federal nature of Canada, and with the division of powers between federal and provincial governments. Attention will also be paid as well to the significance of the more recent inclusion in the Canadian constitutional structure of an entrenched charter of rights which provides the standard against which all public decisions and acts are now measured.

In the latter part of the course, attention will shift to the principles which have been articulated by the courts for the judicial review of public decision-making, particularly decisions made by the administrative tribunals that are the hallmark of the administrative state. The evolution in the courts' understanding of the nature and legitimacy of public decision-making, as well as the current scope of judicial deference to those decisions, will be the focus of this discussion. In this part of the course, there will also be an opportunity to consider the significance of the principles of judicial review for questions of tribunal independence, appointments, policy- and rule-making and legislative drafting.



## REQUIRED READINGS

The materials on the reading list will be available on PAWS. It is strongly suggested that students read all readings marked with a \*. The others are optional.

### Week 1 and 2: The Rule of Law

These sessions will explore the concept of the “rule of law” and its significance in relation to the role of legislatures, executive government and courts. Discussion will focus on the implications for the division of powers under the Anglo-Canadian constitutional structure. The first session will also include an overview of the course and an introduction to the area of public law.

- Readings:
- \*David Dyzenhaus, “The Logic of the Rule of Law: Lessons from Willis” (2005) 55 U. T.L.J. 691
  - \*Harry Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 O.H.L.J. 1
  - Jeremy Waldron, “Is the Rule of Law and Essentially Contested Concept (In Florida)?” (2002) 21 Law and Philosophy 137
  - Timothy A.O. Endicott, “The Impossibility of the Rule of Law” (1999) 19 Oxford J. Leg. St. 1
  - \*World Justice Project, “Rule of Law Index, Version 2.0”
  - \*Peter Hogg and Cara F. Zwibel, “The Rule of Law in the Supreme Court of Canada” (2005) 55 U.T.L.J.

### Week 3: The Constitution, Written and Unwritten

In this session, consideration will be given to the continued existence of a common law or unwritten constitution in Canada, notwithstanding the relatively recent development of a written constitutional document.

- Readings:
- \*Mark D. Walters, “The Common Law Constitution in Canada: Return of the *Lex Non Scripta* as Fundamental Law” (2001) U.T.L.J. 91
  - \**Roncarelli v. Duplessis*, [1959] S.C.R. 121
  - \**MacKeigan v. Hickman*, [1989] 2 S.C.R. 796
  - \**A.G. of British Columbia v. Dugald Christie*, [2007] 1 S.C.R. 873
  - Cass Sunstein, “Incompletely Theorized Agreements” (1994-95) 108 Harv. L. Rev. 1733

### Week 4: Federalism and the Charter

The purpose of this session will be to sketch out the elements of the Canadian constitutional regime, and to look in particular at the division of powers between federal and provincial governments, and the significance of the entrenchment of the *Charter of Rights and Freedoms*.

- Readings:
- \**Starr v. Houlden*, [1990] 1 S.C.R. 1366
  - \**R. v. Hydro Quebec*, [1997] 3 S.C.R. 213
  - \**Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188
  - \**Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3
  - \**R. v. Oakes*, [1986] 1 S.C.R. 103
  - \*Mary Hurley, “Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions”

### Weeks 5 to 7: Parliamentary Sovereignty and Judicial Review

The subject of these sessions will be the interplay of the notion of Parliamentary sovereignty under the constitution with the role of the courts on judicial review. The principles of judicial review articulated by the courts will be examined. This

discussion will outline both the criteria developed by the courts for assessment of the procedural aspects of decision-making, and the standards used for substantive review.

- Readings:
- \*T.R.S. Allan, “Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism”: (1985) 44 Cambridge L.J. 111
  - R.A. MacKay, “Coke – Parliamentary Sovereignty or the Supremacy of the Law?” (1924) 22 Michigan L. Rev. 215
  - \*David Mullan, “Developments in Administrative Law”  
*Canadian Union of Public Employees v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227
  - \**Baker v. Canada (Citizenship and Immigration)*, [1999] 2 S.C.R. 817
  - \**Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982
  - \**Dunsmuir v. New Brunswick*, 2008 SCC 9

### **Weeks 8 and 9: Administrative Tribunals**

The focus for these sessions will be on a ubiquitous vehicle for making public decisions in the modern state – the administrative agency or tribunal operating at arms length from government, usually within the framework of a mandate defined by statute. The sessions will include a consideration of the rationale for the creation of administrative tribunals, the remedial options available to tribunals and recent efforts in some jurisdictions to establish an “administrative justice system.”

Readings:

- \*H.W. Arthurs, “The Administrative State Goes to Market (And Cries ‘Wee, Wee, Wee’ All the way Home)” (2005) 55 U.T.L.J. 797
- \*Frank A.V. Falzon, “The Statutory Powers and Procedures of Administrative Tribunals in British Columbia” (Victoria: Administrative Justice Project, 2002)
- \*Wendi J. Mackay, Administrative Institutions from Principles to Practice: Guidelines for Review and Design” (2006) 19 C.J.A.L.P. 63
- \*France Houle, “Constructing the Fourth Branch of Government for Administrative Tribunals” (2007) 37 Sup. Ct. L. Rev. (2d) 117
- \*S. Ronald Ellis, “The Justicizing of Quasi-Judicial Tribunals” (2006) 19 C.J.A.L.P. 303 and (2007) 20 C.J.A.L.P. 69

### **Week 10: Tribunal Independence and Appointments**

In this session, the current legal requirements for independence for administrative tribunals will be considered; in particular, the views of the Supreme Court of Canada about how the standards for tribunal independence compare to those for judicial independence will be discussed. The session will also include a discussion of some of the issues related to tribunal appointments.

- Readings:
- \*Lorne Sossin, “The Uneasy Relationship Between Independence and Appointments in Canadian Administrative Law” in Grant Huscroft and Michael Taggart, eds., *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006)
  - \*David Mullan, “Ocean Port Hotel and Statutory Compromises of Tribunal Independence” (2002) 9 C.L.E.L.J. 193
  - \*Robert J. Sharpe and Shirley Margolis, “Therrien, Ocean Port and the Doctrines of Judicial and Tribunal Independence” (2002) 16 Sup. Ct. L. Rev. (2d) 315

Michel LeFrançois, “Powers of Management of the Federal Administrative Tribunal Chair: Their Impact on Discipline and Independence of Members” (1998) 10 C.J.A.L.P. 77

\**Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781

British Columbia, Administrative Justice Project, “Independence and Accountability: Report and Recommendations” July, 2002

British Columbia, Administrative Justice Project, “Making Sound Appointments: Report and Recommendations” July, 2002

### **Week 11: Tribunal Expertise and the Example of the *Charter***

The criterion of expertise – described by one judge as the most important aspect of the standard of review – will be examined. In particular, the capacity of administrative decision-makers to interpret and apply the *Charter* will be considered.

Readings: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748

\**Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100

\*Beth Bilson, “The Expertise of Labour Arbitrators” (2005) 12 C.L.E.L.J. 33

\**Nova Scotia (Workers Compensation Board) v. Martin*, [2003] 2 S.C.R. 504

\**Council of Canadians with Disabilities v. VIA Rail*, 2007 SCC 15

\*Beth Bilson, “Voice from the Trenches: Administrative Tribunals and the Interpretation of the *Charter*” (2006) 89 Sask. L. Rev. 3

### **Weeks 12 and 13: Discretion, Soft Law and Policy-Making**

This session will be devoted to a consideration of the nature and scope of administrative discretion, and to the ability of administrative tribunals to make use of “soft law” – guidelines, policies and rules – as a way of advancing legislative policy.

[Please note that arrangements are being made to have a guest speaker join by videoconference in Week 12.]

Readings: \*Geneviève Cartier, “The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law – The Case of Discretion” in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004)

\*Lorne Sossin, “The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion” in Dyzenhaus, ed., *The Unity of Public Law*

\*Lorne Sossin and Charles W. Smith, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Governments” (2003) 40 Alta. L. Rev. 867

\*Lorne Sossin, “From Neutrality to Compassion: the Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion” (2005) 55 U.T.L.J.

*Baker v. Canada (Citizenship and Immigration)*, [1999] 2 S.C.R. 817

\**Minister of Citizenship and Immigration v. Thamothearem*, 2007 FCA 198

### **SUPPLEMENTARY READINGS**

## **EVALUATION**

30% of the final grade in the course will be awarded on the basis of class participation. This will include the provision of two in-class presentations on assigned material, brief written versions (2 to 3 pages) of those presentations, and contribution to class discussion.

The remaining 70% of the grade will be based on **EITHER**:

A research paper of 25 to 30 pages in length, on a topic to be chosen in consultation with the instructor. **The instructor will provide feedback on a draft of this paper if it is submitted at least two weeks prior to the due date.**

### **OR**

A final examination worth 70% of the final grade. The examination will be in take-home format and students will have one week to write it.

All written assignments are due on **Wednesday, April 7.**

## **LATE ASSIGNMENTS**

For each written assignment that is submitted after 4:30 on April 7, 5% will be deducted from the grade for each day or part of a day the assignment is late.

## **STUDENTS WITH SPECIAL NEEDS**

All students who have special needs are encouraged to register with Disability Services for Students (DSS). Access to most services and programs provided by DSS is restricted to students who have registered with the office. Once you have registered, please contact the professor to discuss accommodations.

## **ACADEMIC INTEGRITY AND CONDUCT**

Ensuring that you understand and follow the principles of academic integrity and conduct as laid out in the University of Regina's Graduate Calendar and the University of Saskatchewan's Guidelines for Academic Conduct is vital to your success in graduate school. Ensuring that your work is your own and reflects both your own ideas and those of others incorporated in your work is important: ensuring that you acknowledge the ideas, words, and phrases of others that you use is a vital part of the scholarly endeavour. If you have any questions at all about academic integrity in general or about specific issues, contact your course instructor and to discuss your questions.