

Course Outline

COURSE:	LAWS 4801A – RISK AND THE LEGAL PROCESS
TERM:	FALL 2019
PREREQUISITES:	LAWS 2908 or PAPM 3000 and Fourth-Year Honours standing
CLASS:	Day & Time: Fridays, 14:30pm - 17:30pm Room: Please check with Carleton Central for current room location
INSTRUCTOR: (CONTRACT)	Tara Ashtakala
CONTACT:	Office: Room B442 Loeb Building (Contract Instructor's Office) Office Hrs: By appointment only Email: tara.ashtakala@carleton.ca

CALENDAR COURSE DESCRIPTION

Application of risk assessment and management in various legal arenas including insurance, liability and tort, litigation management, environmental protection, and sentencing and parole.

COURSE DESCRIPTION

Risk management is **not just for business majors** anymore; it is an increasingly important aspect of both public and private activities. Nowadays, the ability to anticipate the consequences in law of a proposed or uncontrollable event is essential for legal counsel, whether your client is an individual involved in an everyday consumer transaction or a construction company carrying out a megaproject or a government institution concerned with protecting the safety of the public. Policies, contracts and even lifestyles need the rigorous scrutiny of the legal professional in order to avoid lawsuits or other adverse legal consequences. This course is intended to introduce students of law and legal studies to the situations, actors, methodology and societal impact of risk management. You will be surprised and intrigued by the diversity of issues that you will be exposed to in this course and you will use the skills you learn herein in your future law-related career.

REQUIRED TEXTS

Required readings will be posted on CuLearn; some will have online links. Case study exercises will be distributed in class.

EVALUATION**(All components must be completed in order to get a passing grade)**

Standing in a course is determined by the course instructor subject to the approval of the Department and of the Faculty Dean. This means that grades submitted by the instructor may be subject to revision. No grades are final until they have been approved by the Department and the Dean.

(1) Term Essay- 40% of final grade

- **essay due on 6 December 2019 upload to CULearn**
- Length: 12-15 pages double-spaced, McGill style legal citation and bibliography required
- Content: legal analysis of issue, based on Course Objectives above, and defense of position
- **Canadian spelling only (this is not a joke):** if you are going to use spell-checking applications to review your text, you should first ensure that the language settings on your computer are set to Canadian English or Multilingual Standard.

(2) Open book final examination - 45% of final grade - final exam period: 9-21 Dec 2019

- the objective of the exam is to put you in the position of a decision-maker in a situation of imminent risk; you must use all the tools at your disposal (readings, lectures and case studies done in class) to assess the risks and to choose the most legally sound course of action in four different scenarios, in a formally scheduled 3 hour final exam.

(3) Presentation and class participation - 15% of final grade

Each student will be required to give a 10-15 minute presentation on the subject of his/her Term Essay research paper, as well as participate in the discussions following each of the presentations of the other members of the class. The presentation will be in the form of a debate on the risks and counterarguments (pros and cons) of the issue. This will require the student to partner up with a colleague in the class. The student scheduled to present that day will prepare the risk analysis of his or her topic, while the partner will come up with counter arguments and the presenting student will then have to reply to the counterarguments for the remainder of the presentation. Each debate presented will constitute the mark for the one student whose chosen topic is being debated; in other words, every student in the class has to prepare and present a debate on their selected issue. A sign-up sheet for presentation dates will be circulated at the first class.

- **You must sign up for a presentation date by 20 Sep 2019**

SCHEDULE**6 Sep INTRODUCTION AND OVERVIEW****13 Sep THE NATURE OF RISK AND UNCERTAINTY****A. Situations of Risk**

1. Sharratt, "Risk Renewal" Canadian Insurance 10 (January 2002)

2. Baer, "Thinking Outside The Courtroom," 2 Just. Can. 1 (2003)
3. "As gene testing surges, lawsuits aren't far behind". Couzin-Frankel, J. May. 7, 2019 , 3:05 PM accessed from <https://www.sciencemag.org/news/2019/05/gene-testing-surges-lawsuits-arent-far-behind-on-18-August-2019>. (Word file in CULearn).
4. Krishna, "Crime Pays More If You've Got Class," Globe & Mail, April 29 (2002)
5. "World's first humanitarian insurance policy issued", World Food Programme, 06/3/6
6. Dostmohammed and Long, 'Regulating the Sharing Economy', Dalhousie, 2015
7. Curcio, Stephanie. Protecting Cannabis Strains in Canada: a Growing Concern
8. 'Laser scam' gamblers to keep £1m , BBC News online, 5 December 2004

B. Communication of Risk

1. Kahan, 'A Risky Science Communication Environment for Vaccines' (2013)

20 Sep ONGOING DEBATES IN RISK MANAGEMENT

A. Risky behaviours: do we allow, penalize or absorb risk-taking?

1. "Fronting for Business", multinationalmonitor.org
2. Wildavsky, "No Risk Is the Highest Risk of All" in Glickman & Gough eds., Readings In Risk (1990) at 120
3. Palazzo, No-fault Insurance in Canada read pp. 5-16
4. Culpability and Compensation in Canadian Health Care: Much Ado About No-Fault? Chris Hubbard, CROSSROADS: WHERE MEDICINE AND THE HUMANITIES MEET, 1999.
5. Van Waarden, "Institutions and Innovation - the legal environment of innovating firms", accessed at www.findarticles.com , Organization Studies, Sept-Oct. 2001

B. Regulation v Innovation: managing risk through regulation (or not)

1. Macdonald, "Coerciveness and the selection of environmental Policy instruments," 44 Can. Pub. Admin., 161
2. Macrory, "Regulating In a Risky Environment," 54 Current Legal Problems 619 (2001)
3. Kam, Allan J. "NHTSA Safety Investigations", 2001 read up to end of *Pittman Arms* case discussion
4. The risks posed by discretion in decision-making: case study of wildlife protection (*Vorster and Another v Department of Economic Development, Environment and Tourism Limpopo Provincial Government and Others* (38733/05 , 38733/05) [2006] ZAGPHC 44 (5 May 2006)); read paras. 1-8(incl), 10,11,15,16,17.
5. *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 (CanLII) , at <http://www.canlii.org/en/ab/abca/doc/2014/2014abca285/2014abca285.html>

27 Sep TOOLS FOR THE PREVENTION AND/OR MITIGATION OF RISK

A. Planning for Risk in Contracts

1. Triantis, "Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability" 42 Univ. Tor. L.J. 450 (1992)

B. Precautionary Principle

1. Morris, "Defining the Precautionary Principle", Ch. 1 (2000)

C. Concept of Insurance

1. Tanega, "Implications Of Environmental Liability On The Insurance Industry," 8 Jour. Environmental Law read pp. 116, 117, 123, 124,126,128,129,135,136.
2. Flyvbjerg et al, "Megaprojects and Risk" Ch. 7 (2003)

D. Tort Action

- Comite d'environnement de la Baie Inc. c. Societe d'electrolyse et de chimie Alcan* [1990] RJQ 655, 6 CELR (NS) 150(Que. CA), leave to appeal refused [1990] 2 SCR xi.
- Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/835/index.do> read headnote and pp. 253- 256.

4 Oct RISK IN THE LEGAL PROCESS (RISK MANAGEMENT STRATEGIES IN THE COURTOOM)**Practical risk issues encountered in the trial process**

1. *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672 read PDF pages pp. 4-7, 12, 13.
2. *R. v. Mohan*, [1994] 2 S.C.R. 9 read PDF pages 5,6,12, 13
3. *R. v. Bingley*, 2017 SCC 12 read headnote
4. Galligan, Report to the Attorney General of Ontario on Certain Matters Relating to Karla Homolka
5. The risks of witness testimony: *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726
6. Lederer, "The Road to the Virtual Courtroom?" read pp. 5-34 only
7. 'Representing yourself in court is popular but costly and risky', CBC News, 31

December 2015 at <http://www.cbc.ca/news/canada/representing-self-court-lawyers-1.3375609> .

DEALING WITH RISK IN VARIOUS TYPES OF LAW**11 Oct DISASTERS AND RISK MANAGEMENT**

1. Thornton, "Hurricane Katrina - The Legal Saga Begins", www.tortlaw.net
2. Bannon and Fisher, "Legal Lessons in Disaster Relief from the Tsunami, the Pakistan Earthquake and Hurricane Katrina", American Society for International Law, vol. 10, Issue 6, 15 March 2006.
3. Text of Bill C-78, An Act to provide for emergency management and to amend and repeal certain acts, 1st Session, 38th Parliament, 53-54 Elizabeth II, 2004-2005.
4. United Nations Development Program, "Is Sustainable Human Development Achievable under Natural Disaster Risk?", in Reducing Disaster Risk: A Challenge for Development, ch.1, s.6 (2004). Read up to p. 25
5. *Georges et al v United Nations et al*, US District Court Southern District of New York, 13-CV-7146 (JPO), 9 Jan 2015.

18 Oct RISK AND PUBLIC HEALTH

1. *Schneider v. The Queen*, [1982] 2 S.C.R. 112 at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2449/index.do>; read the headnote; read the reasons of Justice Estey; and read the reasons of the Chief Justice from Section VII “Laws for the Peace, Order and Good Government of Canada”, starting at “There is no material before the Court leading one to conclude ...” up to (not including) Section VIII “Criminal Law”.
2. *The Attorney-General of Ontario and others (Appeal No. 2 of 1940) v The Canada Temperance Federation (Ontario)* [1946] UKPC 2 (21 January 1946), at http://www.bailii.org/uk/cases/UKPC/1946/1946_2.html Click on “Judgement”
3. World Trade Organization, “*EC Measures Concerning Meat and Meat Products (Hormones)*”, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R 16 January 1998
4. “Safety of Plasma Derivatives: The Role of Regulation”, extract from Final report of the Commission of Inquiry on the Blood System in Canada
5. . “Legal Access and Preparedness”, extract from The SARS Commission, Second Interim Report: SARS and Public Health Legislation read section on “Legal Preparedness” ppp 289-206.
6. “Public Inquiry into the Safety and Security of Residents in the Long-Term Care Homes System” (Wetlauffer Inquiry), August 2019; read pp. 4,5,11 part E, 341,342, 566,567,568,569,570.skim 648-654.

25 Oct No class, Fall Break**1 Nov RISK ISSUES IN CRIMINAL LAW**

1. “Offender Risk Assessment”, John Howard Society of Alberta (2000), accessed at <http://www.johnhoward.ab.ca/pub/C21.htm>
2. MacAllister, “Use of Risk Assessments by Canadian Judges in the Determination of Dangerous and Long-term Offender Status from 1997-2002,” Draft May 12, 2003 read pp 3, 4, 5, 11-14, 21, 24, 25, 26, 27, 31, 32.
3. Examining the High-Risk Accused Designation for Individuals Found Not Criminally Responsible on Account of Mental Disorder; Goossens, Ilvy; Nicholls, Tonia L; Charette, Yanick; Wilson, Catherine M; Seto, Michael C; et al. Canadian Psychology; Ottawa Vol. 60, Iss. 2, (May 2019): 102-114. DOI:10.1037/cap0000080
Read pages 1.4 (up to “Current Study”), page 8 from “Discussion” to p.10
4. *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165 read paras. 1-12 (incl), 13-16 (incl), 22,23, 26 A, 43,44, 61-67.
5. Shute, “The place of Public Opinion in Sentencing Law,” [1998] *Crim. L. Rev.* 405 read pp. 1,2,3,4 and Conclusion p. 6.

8 Nov VOLUNTARY ASSUMPTION OF RISK : THE CASE OF SPORT

- 1.Husa & Thiele, “In the Name of the Game: Hockey Violence and the Criminal Justice

- System.” 45 Crim. L. Q. 509 [2002]
2. Citron, Jeffrey A. & Ableman, Mark, “Civil liability in the arena of professional sports”. 36 U.B.C. L. Rev. 193-230 (June 2003)
 3. *R. v. Jobidon* [1991] 2 S.C.R. read headnote, pp 720-723, 727-732, 741 from “We have observed from our analysis of the Code and the common law...” to 745, 760-768.
 4. *R. v. Cey*, 75 Sask. R. 53; 48 C.C.C. (3d) 480 (C.A. 1989)
 5. *R. v. Leclerc*, 4 O.R. 788; 67 C.C.C. (3d) 563 (C.A. 1991)
 6. *Agar v Canning*, decision of Bastin J., Manitoba Court of Queen’s Bench, 54 WWR 302, 15 September 1965.
 7. *Dunn v University of Ottawa* (1995), Unreported Decision of the Ont. Ct. of Justice (Gen. Div.), Docket No. OJ2865.

15 Nov VOLUNTARY ASSUMPTION OF RISK: THE CASE OF TORT
-Challenges to using the defence of *volenti* in civil lawsuits:

• **Occupations considered to be essential**

R v Port Colborne (City of) (1992) O.J. 2555 - Word file read paras. 2,3,4,6,7,8,11,12,13,16 (just skim),17,18,20

Saskatchewan Federation of Labour v Saskatchewan 2015 SCC 4 at

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do>

read paras. 1-10, 30, 32, 45, 51, 82-87, 95.

• **Intoxication**

Dube v. Labar, 27 D.L.R. (4th) 653; 36 C.C.L.T. 105 (Sup. Ct. Can. 1986)

Crocker v. Sundance Northwestern Resorts Ltd., 51 D.L.R. (4th) 321; 44 C.C.L.T. 225 (Sup. Ct. Can.(1988)

Childs v. Desormeaux, 2006 SCC 18

• **Rescuers and Good Samaritans**

Horsley v. MacLaren, [1972] S.C.R. 441 read majority decision of Ritchie J

Coopersmith v. Air Canada, 2009 QCCQ 5521

22 Nov RISK AND THE MEDIA

- *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/443/index.do?r=AAAAAQAJJSXJ3aW4gVG95AAAAAAAAAAQ>, read headnote only

- Harper v Canada (Attorney General), [2004] 1 S.C.R. 827, 2004 SCC 33 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2146/index.do>; read headnote only
- R. v. Butler, [1992] 1 S.C.R. 452 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/844/index.do>; read headnote only
- R. v. Keegstra, [1990] 3 S.C.R. 697 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/695/index.do> read headnote only
- Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11, [2013] 1 S.C.R. 467 read headnote only at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12876/index.do> headnote only
- Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1204/index.do>
- R. v. Mentuck, [2001] 3 S.C.R. 442 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1917/index.do> read paras. 1-8, 22-60.
- Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1981/index.do> read paras. 1-11, 35-90.
- A.B. v Bragg Communications Inc., 2012 SCC 46, at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10007/index.do>
- R v Elliott, 2016 ONCJ 35 at <http://www.canlii.org/en/on/oncj/doc/2016/2016oncj35/2016oncj35.pdf> read pages 1-6 and 55-57.

29 Nov CORPORATE LEGAL RISKS and REVIEW OF COURSE

- Corporate Governance : Control
 - *Buckerfield's Limited et al. v. M.N.R.*
[1964] C.T.C. 504, [1965] 1 Ex. C.R. 299, 64 D.T.C. 5301
 - “Exclusive: New documents link Huawei to suspected front companies in Iran, Syria”. Reuters, 8 January 2019, accessed at <https://www.reuters.com/article/us-huawei-iran-exclusive/exclusive-new-documents-link-huawei-to-suspected-front-companies-in-iran-syria-idUSKCN1P21MH> on 12 August 2019
- Compliance
 - *Royal British Bank v Turquand* (1856) 6 E&B 327 at <http://www.commonlii.org/uk/cases/EngR/1856/470.pdf>

- *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305, 2008 SCC 12 at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/4620/index.do?r=AAAAAQAUY29ycG9yYXRlIGNvbXBsaWFuY2UB> read paras 1-16, 18,19,27-31,40-46,50-70.
 - Shareholder Activism
 - *Trinity Wall Street v Wal-Mart Stores Inc*, United States Court of Appeals,Third Circuit, No. 14-4764. Decided: July 06, 2015 at <https://caselaw.findlaw.com/us-3rd-circuit/1706895.html> read sections I; II A, B, C; III C,D; IV A, B.
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ACADEMIC ACCOMMODATIONS

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

Pregnancy obligation: Please contact me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details, visit the Equity Services website:

<https://carleton.ca/equity/accommodation/academic/students/>

Religious obligation: write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details, visit the Equity Services website: <https://carleton.ca/equity/accommodation/academic/students/>

Academic Accommodations for Students with Disabilities: If you have a documented disability requiring academic accommodations in this course, please contact The Paul Menton Centre (PMC) at 613-520-6608 or pmc@carleton.ca for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your Letter of Accommodation at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (if applicable). After requesting accommodation from PMC, meet with me as soon as possible to ensure accommodation arrangements are made. Please consult the PMC Website for their deadline to request accommodations for the formally-scheduled exam (if applicable).

<https://carleton.ca/pmc/students/accommodations/>

Plagiarism

Plagiarism is presenting, whether intentional or not, the ideas, expression of ideas or work of others as one's own. Plagiarism includes reproducing or paraphrasing portions of someone else's published or unpublished material, regardless of the source, and presenting these as one's own without proper citation or reference to the original source. Examples of sources from which the ideas, expressions of ideas or works of others may be drawn from include but are not limited to: books, articles, papers, literary compositions and phrases, performance compositions, chemical compounds, art

works, laboratory reports, research results, calculations and the results of calculations, diagrams, constructions, computer reports, computer code/software, and material on the Internet. Plagiarism is a serious offence.

More information on the University's Academic Integrity Policy can be found at:

<https://carleton.ca/registrar/academic-integrity/>

Survivors of Sexual Violence

As a community, Carleton University is committed to maintaining a positive learning, working and living environment where sexual violence will not be tolerated, and survivors are supported through academic accommodations as per Carleton's Sexual Violence Policy. For more information about the services available at the university and to obtain information about sexual violence and/or support, visit:

<https://carleton.ca/sexual-violence-support/>

Accommodation for Student Activities

Carleton University recognizes the substantial benefits, both to the individual student and for the university, that result from a student participating in activities beyond the classroom experience. Reasonable accommodation must be provided to students who compete or perform at the national or international level. Please contact your instructor with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist.

<https://carleton.ca/senate/wp-content/uploads/Accommodation-for-Student-Activities-1.pdf>

For more information on academic accommodation, please contact the departmental administrator or visit: <https://carleton.ca/equity/accommodation/academic/>

Department

Policy Department of Law and Legal Studies operates in association with certain policies and procedures. Please review these documents to ensure that your practices meet our Department's expectations. <http://carleton.ca/law/current-students/> The