

---

<b>COURSE:</b>	<b>LAWS 4801A – Risk and the Legal Process</b>
<b>TERM:</b>	<b>FALL 2020</b>
<b>PREREQUISITES:</b>	<b>LAWS 2908 or PAPM 3000 and fourth-year Honours standing.</b>
<b>CLASS:</b>	<b>Day &amp; Friday 14:35-17:25</b> <b>Time: All courses during the Fall 2020 semester will be delivered online. The lectures in this course will be delivered “live”, online every week during our regularly scheduled class time using the Zoom conferencing platform</b>
<b>INSTRUCTOR: (CONTRACT)</b>	<b>Tara Ashtakala</b>
<b>CONTACT:</b>	<b>Office: B443 Loeb</b> <b>Office Hrs: By appointment</b> <b>Telephone: 613-520-3690</b> <b>Email: Tara.Ashtakala@carleton.ca</b>

---

### **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.

### **COURSE OBJECTIVES**

- to identify situations of risk with legal implications
- to determine which actors (individuals, governments, courts) are affected by the risk issue

- to evaluate the strategies employed by those actors for preventing or mitigating (ie managing) risk
- to explore the impact of the risk and its management on law and society as a whole

### **REQUIRED TEXTS**

There is no textbook for this course. **Required Readings will be posted in PDF form on cuLearn**; only those in the last lecture topic will have online links. **PLEASE NOTE THAT YOU ARE REQUIRED TO READ ONLY THOSE PARAGRAPHS OR PAGES INDICATED IN THE PRE-LECTURE NOTES, NOT THE ENTIRE DOCUMENT.**

### **COURSE DELIVERY:**

- Pre-lecture notes will be posted on CULearn prior to each class, indicating readings to be done ahead of lecture and containing questions that help the student focus on the most important concepts from each reading.
- **Lectures will be delivered synchronously via Zoom, at the time and on the day indicated above for the particular course section. It is during lecture that the answers to the questions in the pre-lecture notes will be discussed.**
- **Case study exercises, involving group discussions, will also be conducted during the synchronous lecture session.**
- The synchronous portion of the lectures will be of no more than 2 hours duration
- The presentation and research paper components of evaluation in the course will be submitted by students as per the deadlines indicated in the "Evaluation" section below.

### **EVALUATION**

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.

**All three (3) components must be completed in order to get a passing grade**

#### **(1) Term Research Paper- 40% of final grade**

- **essay due on 11 Dec 2020:** upload to CULearn
- Length: 12-15 pages double-spaced, proper legal citation and bibliography required
- Format: the paper must embody the Course Objectives above
- **Use Canadian Guide to Uniform Legal Citation (McGill Guide) at [https://library.carleton.ca/sites/default/files/help/writing-citing/Using\\_uniform\\_legal\\_citation\\_2018.pdf](https://library.carleton.ca/sites/default/files/help/writing-citing/Using_uniform_legal_citation_2018.pdf)**
- **Use Canadian spelling only;** 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.
- The task for the Term Essay is to perform a risk analysis on a legal topic of interest to the student; the goal of the exercise is to demonstrate that the four point methodology above can be used to assess the best course of legal action for any situation.

#### **(2) Open book final examination - 50% of final grade**

- **Exam will take place during formal exam period of 12-23 December 2020**
- 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 - 10% of final grade**

- Each student will be required to record a 10-15 minute video presentation on the subject of his/her Term Research paper.
- Your task in the presentation assignment is to create a lecture on the risk topic you have chosen and to impart – to your colleagues and to me – your understanding of: 1) why the social and legal impacts of the risk are a problem; 2) how the law has dealt with the risk; 3) the defects in how the law has dealt with the risk (and therefore this is why the risk is causing social and legal problems); 4) how the defects in the law should best be rectified in order to minimize the risk of the adverse legal consequences recurring in the future.
- Since, as we will learn in the course, legal risk cannot be entirely prevented, the assignment is generally about finding the best legal course of action – whose benefits outweigh the risks - to deal with the ongoing legal problem you have identified.
- The presentation is meant to simulate you giving a lecture to your colleagues in class. Therefore, you must use a mix of different audio-visual formats: you will need to show yourself orally presenting some points; use Power Point or Prezi slides for others; and you can even show a video clip – although it must not be longer than 2 minutes and must not speak for you.
- Video is to be uploaded to Youtube or Google Drive and the link must be sent to me as per the following deadlines:
  - **IF YOUR SURNAME STARTS WITH A-C: OCTOBER 16**
  - **IF YOUR SURNAME STARTS WITH D-F: OCTOBER 23**
  - **IF YOUR SURNAME STARTS WITH G-I: OCTOBER 30**
  - **IF YOUR SURNAME STARTS WITH J-L: NOVEMBER 6**
  - **IF YOUR SURNAME STARTS WITH M-O: NOVEMBER 13**
  - **IF YOUR SURNAME STARTS WITH P-R: NOVEMBER 20**
  - **IF YOUR SURNAME STARTS WITH S-V: NOVEMBER 27**

### **DIVERSITY AND INCLUSION IN COURSE CONTENT AND EXECUTION:**

Lawyers need to be able to read statutes, in order to apply them in the courtroom. It is equally important to the success of a lawyer's case to know what the statute does not say.

Systemic inequalities in access to the courts is a fundamental legal risk to the justice system. Even if judges and lawyers themselves come from under-represented communities, their fellow citizens who are not legal scholars more often do not get to voice their concerns by arguing in courts of law, nor do they get to publish scholarly articles about them.

You will notice from this Outline that a large number of readings in this course are cases. I ask students to read case law so that we can together glean from it the basic thematic issues of legal risk management. It is whilst reading a case that students also have the opportunity to think critically about what the ruling does not say about how the outcome of a case impacts the most suppressed voices in society; indeed, the questions in the pre-lecture notes for this course will require you to do so. It is also expected that students will include those insights in their presentation and research paper assignments, as well as express them in the honest, yet respectful, debates that comprise the live case study discussions following each lecture.

**LATE PENALTIES AND REQUESTS FOR EXTENSIONS:** The granting of extensions is determined by the instructor who will confirm whether an extension is granted and the length of the extension. For requests for extensions lasting less than 7 days, please complete the form at the following link and submit it to the instructor prior to the assignment due date:  
<https://carleton.ca/registrar/wp-content/uploads/self-declaration.pdf>.

**Extensions for longer than 7 days will normally not be granted.** In those extraordinary cases where extensions lasting longer than 7 days are granted, the student will be required to provide additional information to justify the longer extension (up to a maximum of 14 days).

## **LECTURE SCHEDULE**

### **11 Sep INTRODUCTION AND OVERVIEW**

### **18 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. Sudell, "To Tell Or Not To Tell: The Scope Of Physician-Patient Confidentiality When Relatives Are At Risk Of Genetic Disease," 18 J.Cont.Health L And Policy 273 (2001)
4. Krishna, "Crime Pays More If You've Got Class," Globe & Mail, April 29, B9 (2002)
5. "World's first humanitarian insurance policy issued", World Food Programme, 06/3/6
6. 'Laser scam' gamblers to keep £1m , BBC News online, 5 December 2004

#### **B. Nature of Risk**

1. Short, "Essence of Risk"

### **25 Sep ONGOING DEBATES IN RISK MANAGEMENT**

#### **A. Risky behaviours: do we penalize risk-taking or absorb it collectively?**

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. No-Fault Automobile Insurance. Christopher J. Bruce & Angela Tu Weissenberger, ECONOMICA LTD. The Expert Witness Newsletter, Autumn 2001 Vol. 6, No. 3
4. Culpability and Compensation in Canadian Health Care: Much Ado About No-Fault? Chris Hubbard, CROSSROADS: WHERE MEDICINE AND THE HUMANITIES MEET, 1999.

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

1. Van Waarden, "Institutions and Innovation - the legal environment of innovating firms" , Organization Studies, Sept-Oct. 2001
2. Macdonald, "Coerciveness and the selection of environmental Policy instruments," 44 Can. Pub. Admin., 161
3. Macrory, "Regulating In a Risky Environment," 54 Current Legal Problems 619

(2001)

- op cit.  
R.1301[2001]  
(CanLII)
4. Hawkins, "FATCATS" And Prosecution in a Regulatory Agency, Ch.15 in Short
  5. McDonald, "Judicial Review Of NHTSA Ordered Recalls," 47 Wayne Law
  6. Ernst v Alberta (Energy Resources Conservation Board), 2014 ABCA 285

## 2 Oct TOOLS FOR THE PREVENTION AND/OR MITIGATION OF RISK

### A. Concept of Insurance

1. Tanega, "Implications Of Environmental Liability On The Insurance Industry," 8 Jour. Environmental Law
2. Flyvbjerg et al, "Megaprojects and Risk" Ch. 7 (2003)

### B. Tort Action

- Comite d'environnement de la Baie Inc. v. Societe d'electrolyse et de chimie Alcan*  
[1990] RJQ 655, 6 CELR (NS) 150(Que. CA), leave to appeal refused [1990] 2 SCR xi.

### C. Precautionary Principle

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

### D. 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)

## 9 Oct RISK IN THE LEGAL PROCESS

### A. Practical risk issues encountered in the trial process

1. Valverde, Levi & Moore, "Legal Knowledges of Risks," Draft, Report To the Law Commission of Canada, (May 2003)
2. Reddy, "Claims To Expert Knowledge And The Subversion Of Democracy: The Triumph Of Risk Over Uncertainty", 25 Economy And Society 222 (1996)
3. Maich, "Ethics of Plea Bargains Questioned", Maclean's, 9 July 2007
4. *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45
5. Evidence, Persuasion and the Jury
6. Lederer, "The Road to the Virtual Courtroom?" read pp. 5-34 only

## DEALING WITH RISK IN VARIOUS TYPES OF LAW

### 16 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).

### **23 Oct RISK AND PUBLIC HEALTH**

1. *Schneider v. The Queen*, [1982] 2 S.C.R. 112.
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)
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

### **30 Oct Reading week, no class**

### **6 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
3. *Ewert v Canada* 2015 FC 1093
4. Shute, "The place of Public Opinion in Sentencing Law," [1998] *Crim. L. Rev.* 405

### **13 Nov VOLUNTARY ASSUMPTION OF RISK : THE CASE OF SPORT**

Husa & Thiele, "In the Name of the Game: Hockey Violence and the Criminal Justice System." 45 *Crim. L. Q.* 509 [2002]

Citron, Jeffrey A. & Ableman, Mark, "Civil liability in the arena of professional sports". 36 *U.B.C. L. Rev.* 193-230 (June 2003)

*R. v. Cey*, 75 *Sask. R.* 53; 48 *C.C.C.* (3d) 480 (C.A. 1989)

*R. v. Leclerc*, 4 *O.R.* 788; 67 *C.C.C.* (3d) 563 (C.A. 1991)

*Dunn v University of Ottawa* (1995), Unreported Decision of the Ont. Ct. of Justice (Gen. Div.), Docket No. OJ2865.

### **20 Nov VOLUNTARY ASSUMPTION OF RISK: THE CASE OF TORT**

- Occupations considered to be essential

*Occupational Health and Safety Act of Ontario, R.S.O. 1990, CHAPTER O.1, s. 43(2)*  
*CUPE Local 873 v BC (Ministry of Labour and Citizen`s Services) and WCB (no. 2)*

- **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

*Coopersmith v. Air Canada*, 2009 QCCQ 5521

## 27 Oct RISK AND THE MEDIA

- *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927
- *Harper v Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33
- *R. v. Butler*, [1992] 1 S.C.R. 452
- *R. v. Keegstra*, [1990] 3 S.C.R. 697
- *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835
- *R. v. Mentuck*, [2001] 3 S.C.R. 442
- *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
- *A.B. v Bragg Communications Inc.*, 2012 SCC 46

## 4 Dec 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
- Compliance
  - *Royal British Bank v Turquand* (1856) 6 E&B 327
  - *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305, 2008 SCC 12
- Shareholder Activism
  - *Trinity Wall Street v Wal-Mart Stores Inc*, United States Court of Appeals, Third Circuit, No. 14-4764. Decided: July 06, 2015

---

## **ACADEMIC ACCOMMODATIONS**

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows: <https://carleton.ca/equity/wp-content/uploads/Student-Guide-to-Academic-Accommodation.pdf>

### **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 Department of Equity and Inclusive Communities (EIC): <https://carleton.ca/equity/>

### **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 Department of Equity and Inclusive Communities (EIC): <https://carleton.ca/equity/>

### **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](mailto: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>

### **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/studentsupport/svpolicy/>



**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://students.carleton.ca/services/accommodation/>

**Department Policy**

The 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: <https://carleton.ca/law/current-students/>