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| <b>COURSE:</b>                          | <b>LAWS 4801A – Risk and the Legal Process</b>  |   |
| <b>TERM:</b>                            | <b>Fall 2017</b>                                |   |
| <b>PREREQUISITES:</b>                   | <b>4<sup>th</sup> year Honours Standing</b>     |   |
| <b>CLASS:</b>                           | <b>Day &amp; Time:</b>                          | <b>Friday 11:35-14:25</b>   |
|   | <b>Room:</b>                                    | <b>Please check with Carleton Central for current room location</b> |
| <b>INSTRUCTOR:</b><br><b>(CONTRACT)</b> | <b>Tara Ashtakala</b>                           |   |
| <b>CONTACT:</b>                         | <b>Office:</b>                                  | <b>B442 Loeb Building</b>   |
|   | <b>Office Hrs:</b>                              | <b>By appointment</b>   |
|   | <b>Email:</b> <b>Tara.Ashtakala@carleton.ca</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:** 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: <http://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 Equity Services website: <http://carleton.ca/equity/>

**Academic Accommodations for Students with Disabilities:** The Paul Menton Centre for Students with Disabilities (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact 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*).

**Requests made within two weeks will be reviewed on a case-by-case basis.** After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website ([www.carleton.ca/pmc](http://www.carleton.ca/pmc)) for the deadline to request accommodations for the formally-scheduled exam (*if applicable*).

You can visit the Equity Services website to view the policies and to obtain more detailed information on academic accommodation at <http://carleton.ca/equity/>

### **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:

<http://carleton.ca/studentaffairs/academic-integrity/>

**Student Services:** The Centre for Student Academic Support (CSAS) is a centralized collection of learning support services designed to help students achieve their goals and improve their learning both inside and outside the classroom. CSAS offers academic assistance with course content, academic writing and skills development. Visit CSAS on the 4<sup>th</sup> floor of MacOdrum Library or online at [carleton.ca/csas](http://carleton.ca/csas)

### **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.

<http://carleton.ca/law/current-students/>

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### **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**

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

## **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 Essay- 40% of final grade**

- essay due on 1 Dec 2017
- Length: 12-15 pages double-spaced, proper legal citation and bibliography required
- Format: the paper must embody the Course Objectives above
- **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 topic of interest to the student; the goal of the exercise is to demonstrate that the four-point methodology above can be used to evaluate risk in any situation.

#### **(2) Open book final examination - 50% of final grade - final exam period: 10-22 Dec 2017**

- 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 - 10% 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. One student will prepare the risk analysis of his or her topic, while the partner will come up with the counter arguments and the first 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 22 Sep 2017

## **SCHEDEULE**

**8 Sep INTRODUCTION AND OVERVIEW**

**15 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 (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. 'Laser scam' gamblers to keep £1m, BBC News online, 5 December 2004

**B. Communication of Risk**

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

**C. Nature of Risk**

1. Short, "Essence of Risk"

**22 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, A. No-fault insurance In Canada: A Theoretical Background for New Recommendations to Promote Safety and Reduce Highway Deaths; **only read** pp. 1-3; 5 (starting at 'II. Legal Background') to 8 (up to 'D. Inevitable Inadequacies of the Current System'); 11-20 (up to 'C. Stop and Take Notice').
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", accessed at [www.findarticles.com](http://www.findarticles.com), 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)
4. Hawkins, "FATCATS" And Prosecution in a Regulatory Agency, Ch. 15 in Short op cit.
5. Kam, Allan J. "NHTSA Safety Investigations', 2001
6. Ernst v Alberta (Energy Resources Conservation Board), 2014 ABCA 285 (CanLII) at <http://www.canlii.org/en/ab/abca/doc/2014/2014abca285/2014abca285.html>

**29 Oct 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*
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.

**6 Oct RISK IN THE LEGAL PROCESS**A. 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. Galligan, Report to the Attorney General of Ontario on Certain Matters Relating to Karla Homolka
2. The risks of witness testimony: R. v. N.S., 2012 SCC 72, [2012] 3 S.C.R. 726
3. Lederer, "The Road to the Virtual Courtroom?" read pp. 5-34 only
4. '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>
5. R. v. Bingley, 2017 SCC 12 read headnote only

**DEALING WITH RISK IN VARIOUS TYPES OF LAW****13 Oct DISASTERS AND RISK MANAGEMENT**

1. Thornton, "Hurricane Katrina - The Legal Saga Begins", [www.tortlaw.net](http://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).
5. *Georges et al v United Nations et al*, US District Court Southern District of New York, 13-CV-7146 (JPO), 9 Jan 2015.

**20 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](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

## 27 Oct Fall Reading Week, no class

### 3 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

### 10 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.

### 17 Nov VOLUNTARY ASSUMPTION OF RISK: THE CASE OF TORT

#### -Challenges to using the defence of *volenti* in civil lawsuits:

- **Occupations considered to be essential**

*Occupational Health and Safety Act of Ontario, R.S.O. 1990, CHAPTER O.1, s. 43(2)* at [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90o01\\_e.htm#BK75](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90o01_e.htm#BK75)

*CUPE Local 873 v BC (Ministry of Labour and Citizen's Services) and WCB (no. 2)* at [http://www.bchrt.bc.ca/decisions/2009/pdf/dec/446 CUPE\\_Local\\_873\\_v\\_BC\\_\(MLCS\)\\_and\\_WCB\\_\(No\\_2\)\\_2009\\_BCHRT\\_446.pdf](http://www.bchrt.bc.ca/decisions/2009/pdf/dec/446 CUPE_Local_873_v_BC_(MLCS)_and_WCB_(No_2)_2009_BCHRT_446.pdf)

- **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

**24 Nov RISK AND THE MEDIA**

- Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/443/index.do?r=AAAAAAQAJSXJ3aW4qVG95AAAAAAAAAQ>, read headnote only
- Harper v Canada (Attorney General), [2004] 1 S.C.R. 827, 2004 SCC 33 at <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/2146/index.do?r=AAAAAAQAiSGFycGVylHYgY2FuYWRhlChhdHRvcm5leSBnZW5lcmFsKQAAAAAAAE>; read headnote only
- R. v. Butler, [1992] 1 S.C.R. 452 at <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/844/index.do?r=AAAAAAQAGQnV0bGVyAAAAAAAQ>; read headnote only
  - R. v. Keegstra, [1990] 3 S.C.R. 697 at <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/695/index.do?r=AAAAAAQAIIS2VIZ3N0cmEAAAAAAAAB>; 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>
- R v Elliott at <http://www.canlii.org/en/on/onci/doc/2016/2016onci35/2016onci35.pdf> read pages 1-6 and 55-57.
- Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1204/index.do?r=AAAAAAQAIZGFnZW5haXMAAAAAAAAB>
- R. v. Mentuck, [2001] 3 S.C.R. 442 at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1917/index.do?r=AAAAAAQAHWTWVudHVjawAAAAAB>
- Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1981/index.do?r=AAAAAAQAHWTWVudHVjawAAAAAB>
- A.B. v Bragg Communications Inc., 2012 SCC 46, at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/10007/index.do?r=AAAAAAQAHWTWVudHVjawAAAAAB>

**1 Dec REVIEW OF COURSE**