

# CONSTITUTIONAL LITIGATION

## How to Win Constitutional Cases CML 2314

WINTER TERM 2015

PROFESSOR JOSEPH ELIOT MAGNET

### COURSE DESCRIPTION

Constitutional Litigation is an advanced seminar that teaches students how to design, research, prepare for and litigate constitutional cases. The seminar focuses on creating cases that are winnable in court.

Seminar participants examine the elements of plausible and provable cases – from investigation of facts to crafting of remedies. Emphasis throughout is on learning how to design constitutional cases that are winnable.

### REQUIRED TEXTS

Joseph Magnet, *Constitutional Litigation* (2015) hereinafter "Casebook"].

Readings are assigned for each class according to the schedule below. Students are expected to read the materials assigned prior to each seminar.

### SKILLS

What Skills Will You Learn in This Course?

At the conclusion of this course, you should be able to:

- *plan for, design and construct a winnable constitutional case;*
- *develop and assess constitutional evidence;*
- *prepare persuasive pleadings and affidavits;*
- *think strategically and tactically about how to advance constitutional issues and secure remedies that accomplish your client's objectives;*
- *do in-depth, directed research.*

### REQUIREMENTS

Students should choose a constitutional issue, which, throughout the seminar, they will

develop into a winnable constitutional case.

Students will present the theory and theme of their case in seminar 3, prepare an affidavit or pleading for their case in seminar 5, write a research essay developing litigation aspects of their case and do a presentation about their case on dates they select. Students will also critique the affidavit/pleading, the presentation and the research essay of a colleague in the seminar. Details about these requirements follow in the Appendix.

### **GRADUATE STUDENTS**

Graduate students will prepare an additional memorandum on a point of procedure, strategy or tactics.

### **SCHEDULE OF MEETINGS:**

Ftx Rm 102: Tuesdays, Feb 3- March 11, 9:00 to 12:00 noon; Tuesdays, March 18 - April 1, 9:00 am to 1:00 pm

### **WINTER TERM, 2015**

1. Feb 03      Welcome! Let's get organized. Formation of teams. Assignment of topics and dates.  
                  Perspectives on constitutional litigation; Challenges to conduct, institutions, statutes.  
                  3 truths about constitutional litigation  
                  Case Objectives  
                  Net Assessment  
  
                  REQUIRED READING: Casebook, chapter 1
2. Feb 10      Case "theory" and "theme"  
                  Working "backwards"  
                  Remedies  
                  Choice of Forum  
                  Funding  
                  REQUIRED READING: Casebook, chapter 2
3. Feb 17      Discussion of case topics  
                  Theory and Theme Exercises (**Participants must bring the theory and theme of their case on a flash drive**).  
                  Pleadings and Affidavits in Constitutional Cases  
  
                  REQUIRED READING: Casebook, chapter 3  
                  RECOMMENDED READING: Statements of Claim and Affidavits (on reserve)

4. 24 Pleadings, Affidavits and Discovery in Constitutional cases

REQUIRED READING: casebook chapter 3

5. Mar 03 Evidence in constitutional cases  
*Notices & Affidavits, and Statements of Claim Exchanged*

REQUIRED READING: Casebook, chapter 4

6. 10 Critique of Notices & Affidavits, and Statements of Claim

REQUIRED READING: affidavits and pleadings, “How to Critique our Colleagues,” which is the last document in Chapter 4 of the Casebook.

7. 17 Experts and expert evidence

REQUIRED READING: Casebook, chapter 5

8. 24 Presentations 1 & 2

REQUIRED READING FOR CLASSES 8-10: **Seminar participants are required to read the executive summary of the essays distributed by each team prior to that team’s presentation.**

9. 31 Presentations 3 & 4

10. Apr 07 Presentations 5 & 6

## APPENDIX

### **1. Attendance, Contribution, Theory and Theme (5%)**

Attendance and participation are required.

Students must bring to class on a flash drive in .doc, or .ppt, the ‘theory’ and ‘theme’ of their case for the beginning of seminar #3 (**2015 = Feb 17**). The ‘theory’ should be 1 paragraph. The ‘theme’ should be 1 sentence.

### **2. Affidavit & Pleadings (15%)**

Students will prepare either (1) a Notice of Application and expert affidavit, or (2) a Statement of Claim. A guideline for the Affidavits and Statements of Claim is 5 pps.

Students should exchange their notices, affidavits and statements of claim for those of an opposing team, give a hard copy to Prof. Magnet and email a copy to all seminar participants at the beginning of seminar #5 (**2015 = March 3**).

### **3. Student seminars (20%)**

Students will be given 85 minutes to lead a seminar about their issue on a date they select in either seminars 7, 8 or 9. Presentations should describe their case, and indicate briefly the constitutional doctrine that creates a legal issue. The presentation should focus on: the kind of proceeding that will be brought and why it is chosen, who the parties will be and why, what evidence exists and is realistically available, what witnesses will be called and why they have been chosen, what remedies will be sought and why, and identify other significant choices made and the reasons therefore. Seminar leaders should try to stimulate discussion about the issue.

### **4. Research Essay (50%)**

Essay topics must be approved in seminar #2 (**2015 = Feb 10**). An opposing colleague should be selected to critique the essay (described below).

Students should give a hard copy of the essay, with executive summary, to Prof. Magnet and email a digital copy, with executive summary, to all seminar participants one week prior to the presentation. Students are expected to be familiar with at least the executive summary for discussion in class.

The research essay should be 30-50 pp. long. It may explore any aspect of the team’s seminar topic. It should begin with a 1-3 page “executive summary”. The essay should be divided into 3 parts. Part I should describe the subject addressed, state the contentious issues, identify major constitutional doctrine that is relevant to resolution of the issue, and should defend a position on the issues. Parts II and III should focus on the choices you have made to enhance your litigation strategy and tactics. Part II should deal with how the issue will be litigated: who will you

sue among the possible defendants and why; what actions or laws will you challenge and why; what type of action will you bring and why; what remedies will you seek and why. Part III should deal with the evidence you propose to use to prove your case: what sources have you investigated, what evidence have you discovered and what does it tend to prove; what witnesses are available; what choices have you made and why.

The research essay should contain a bibliography of the materials you have consulted.

The research topic may be registered with the law school administration in satisfaction of the law school's major paper requirement.

The University of Ottawa has prepared materials to assist students to avoid plagiarism: see <http://www.uottawa.ca/plagiarism.pdf>

### **5. Critique of Notices of Application & Affidavits, & Statements of Claim (5%)**

Each student will be given 15 minutes in seminar #6 (**2015 = March 10**) to critique the opposing colleague's case. The critique should explain briefly the theory of the opposing colleague's case, and how the opposing colleague's proposes to establish that case. It should comment on the opposing colleague's documents, showing specifically what the opposing colleague has done well, and how the opposing case could be improved. The critique can examine the opposing colleague's theory, particulars, case design, organization, clarity, plausibility or otherwise.

### **6. Critique of Research Essays and Presentations (5%)**

Each student will be given 20 minutes at the end of the seminar presentation of the opposing colleague that has provided it with a research essay. During this time, the student should critique the research essay and presentation, showing specifically how they could be improved as to theory, particulars, design, organization, clarity, plausibility or otherwise.

### **7. Graduate Student Memorandum**

Topics for the graduate student memorandum must be pre-approved. The memorandum should be between 10-15 pps. The results will be averaged together with the research essay, which together will count for 50%.

**For students in need of learning supports**

Students who require accommodations or academic support because of a physical or learning disability, or any condition that affects their ability to learn, are invited to register with **ACCESS SERVICE**:

Office:	UCU 339
Telephone:	613.562.5976
TTY:	613.562.5214
E-mail:	<a href="mailto:adapt@uottawa.ca">adapt@uottawa.ca</a>
Web:	<a href="http://www.sass.uottawa.ca/access/">www.sass.uottawa.ca/access/</a>

Students can meet with an Access Service specialist to identify their individual needs and to discuss appropriate strategies. **All information provided to Access Services and all accommodations received remain strictly confidential.**

**Deadlines to request accommodations for final exams:**

Fall Semester: *before 15 November*

Winter Semester: *before 15 March*