

**HEALTH LAW
LAW 343-A04**

STUDENT MANUAL
Fall 2011

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Chapter 1:

ADMINISTRATIVE INFORMATION

COURSE DESCRIPTION

COURSE CONTENT:

This course will introduce students to fundamental principles of and issues in contemporary health law and policy in Canada. Key topics will include

- legal foundations of Canadian health care, including constitutional dimensions
- regulation of health care professionals and patient safety
- negligence actions in the health care context
- consent to health care treatment
- mental health
- privacy and confidentiality of health information
- public health and public health initiatives
- legal impact of emerging technologies (“telehealth” and “e-health”)
- death, dying and end of life care
- drugs and devices
- human reproductive technologies and genetics

COURSE OBJECTIVES:

The objectives of this course are to introduce students to the fundamental principles of health law and the wide variety of policy issues health law presents.

The course is designed to provide students with opportunities to

- appreciate how health law impacts real people with real problems, and
- develop practical skills in legal discussion, analysis and writing.

REQUIRED TEXTBOOK:

Canadian Health Law and Policy (4th ed.) J. Downie, T. Caulfield & C. Flood, eds. (Butterworths, 2011).

TEACHING METHODS:

Teaching will be primarily by interactive lecture. Students will be expected (but not required) to participate in classroom discussion.

Guest lecturers will also be invited.

EVALUATION:

Students will be required to submit 5 assignments:

#	Description	Word count	Maximum grade available	Percentage of final grade
1	Memo to client	400 - 500	5	5
2	Report to senior lawyer	600 - 750	10	10
3	Policy brief	800 - 1000	15	15
4	Outline & bibliography	400 - 500	5	5
5	Research paper	4000 - 4500	65	65

Students will be assessed on their analysis, argument and writing and, if applicable, their research and grasp of class lectures and discussions. Grades will be based on the following evaluative criteria:

Letter Grade	Grade Point Value	Percentage Value	Narrative Description
A+	9	90-100%	Exceptional, outstanding, and excellent performance, normally achieved by a minority of students. These grades indicate a student who is self-initiating, exceeds expectation, and has an insightful grasp of subject matter.
A	8	85-89%	
A-	7	80-84%	
B+	6	75-79%	Very good, good, and solid performance, normally achieved by the largest number of students. These grades indicate a good grasp of subject matter or an excellent grasp in one area balanced with a satisfactory grasp in another area.
B	5	70-74%	
B-	4	65-69%	
C+	3	60-64%	Satisfactory or minimally satisfactory performance. These grades indicate a satisfactory performance and knowledge of subject matter.
C	2	55-59%	
D	1	50-54%	Marginal performance. A student receiving this grade demonstrates a superficial grasp of subject matter.
F	0	49% and less	Unsatisfactory performance.

Penalties, which are cumulative if there is more than one infraction, will be assessed as follows:

- failure to meet due dates without prior approval from instructor – deduction of 5% of the maximum grade available for the assignment, for each day or part of a day the assignment is late;
- exceeding the word count – that part of an assignment that exceeds the maximum word count will not be read and will not be counted towards the student’s grade;
- failure to follow a submission or format requirement as set out in the Student Manual – deduction of 5% of the maximum grade available for the assignment.

See the Student Manual for Health Law 343, Fall 2011, for further information respecting assignments.

OTHER IMPORTANT NOTES:

Regulations: Students should obtain and review all regulations and policies contained in the current University of Victoria Calendar, especially for the Faculty of Law. The Undergraduate Academic Regulations set out the University's expectations about attendance and assignments.

The Faculty policy concerning deadlines for assignments:

The Faculty expects assignments to be submitted on time; students who are unable to meet a deadline are expected to discuss the matter with their professor. Whether or not an extension of time is granted is within the discretion of the professor and conditional upon the student providing a reasonable excuse. Students who fail, without reasonable excuse, to meet deadlines for written assignments may be penalized in accordance with the grading and penalty assessment policy set by the particular professor, filed with the Dean and communicated to the class at the beginning of the class term.

Appeals against rejection of a student request for additional time to complete the paper, or appeals against an allegedly unfair penalty assessment scheme may be made to the Studies Committee.

Classroom climate: The University of Victoria and the Faculty of Law are committed to promoting, providing and protecting a positive, supportive and safe learning and working environment for all its members. I expect all aspects of this class to be conducted with this commitment firmly in mind as demonstrated in our language, our examples, and the manner in which we conduct our discussions.

We have an ethical and legal obligation to support this kind of environment. For your reference, you may wish to consult the University's Discrimination and Harassment Policy (<http://web.uvic.ca/uvic-policies/pol-1000/1150HPP.html>). If you have any concerns about the climate of the class, please contact me.

Academic integrity: As part of the academic community of both the University as a whole and the Faculty of Law, academic integrity is centrally important in the work of faculty and students. For more information respecting academic integrity, including paraphrasing, plagiarism, and cheating, please consult <http://www.ltc.uvic.ca/initiatives/integrity/student.php> and the University policy (<http://web.uvic.ca/calendar2010/FACS/UnIn/UARe/PoAcI.html>). If you have any concerns or questions, or require clarification, please contact me.

Students with a disability: If you have any type of disability, there are support systems, resources, and accommodation actions available to you. You may access these by contacting the Associate Dean or the Resource Centre for Students with a Disability (<http://rcsd.uvic.ca/>), and I would be more than happy to work with you to ensure your success in this course.

Accommodation of religious observances: The University of Victoria and the Faculty of Law have policies guaranteeing accommodation for students who are unable to participate in a class or in an aspect of the course because of a religious holiday. If you know that you will be missing a class, will be unable to complete an assignment, or will otherwise require accommodation because of a religious holiday, please contact me so we can discuss satisfactory accommodation.

INSTRUCTOR'S INFORMATION

IN BRIEF:

My name is Sherie Verhulst; please call me by my first name.

I am a drafter with the Office of Legislative Counsel, British Columbia. I have held this position for 8 years. Legislative Counsel, for those of you unfamiliar with the term, draft all government legislation, advise on the government's legislative program, and provide specialized advice with respect to statutory interpretation. I draft mostly health legislation, but all drafters tend to work in a number of areas. My past projects have included the following:

- the *Public Health Act*;
- the *E-Health (Personal Health Information Access and Protection of Privacy) Act*;
- the *Coroners Act*;
- the *Public Inquiry Act*.

I have also worked as a solicitor, advising the Ministry of Health; as a legislative analyst for the Ministry of Health; and as a barrister in the field of expropriation law.

I hold both a Bachelor and Master of Laws (Osgoode Hall), as well as a Bachelor of Arts (Simon Fraser University – Criminology) and a Diploma in Public Sector Management (University of Victoria).

CONTACTING ME:

In person: If you would like to speak with me in person, the best times for doing so are before class and during the break. Further, part of Classes 4 and 8 will be set aside for students to discuss their research papers with me, if they wish.

By e-mail: My University of Victoria e-mail is forwarded to my work e-mail address. I will endeavour to respond as soon as I have a break or, if an e-mail came in during the evening, on my return the following day.

IMPORTANT DATES

CLASS DATES:

- First day of class: September 12
- Guest lecturer: September 19
 - Mary Falconer, solicitor to the Ministry of Health
- Guest lecturer: October 31
 - Dr. Brian Emerson, medical consultant to the Ministry of Health
- Last day of class: November 28

ASSIGNMENTS:

#	Description	Assigned	Due
1	Memo to client	Class 3 (September 26)	Class 4 (October 3)
2	Report to senior lawyer	Class 5 (October 17)	Class 6 (October 24)
3	Policy brief	Class 7 (October 31)	Class 9 (November 14)
4	Outline & bibliography	Class 1 (September 12)	Class 7 (October 31)
5	Research paper	Class 1 (September 12)	Class 11 (November 28)

Chapter 2:

CLASS DESCRIPTIONS

Class 1 - Sept 12

JURISDICTION & FUNDING

CLASS CONTENT:

The topics to be covered in this class include the following:

- introduction to the course;
- jurisdiction – who has the power or duty to do what, and what is the source of that power or duty;
- funding – who pays for what type of health care.

CLASS OBJECTIVES:

The objectives of this class are as follows:

- to illustrate the complexity in determining who is responsible for planning and delivery of health care, and thus who has authority to make decisions and who should be held accountable;
- to demonstrate the fragmentation in the government's approach to creating the conditions necessary for health.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- Why is “health” not clearly within either federal or provincial jurisdiction?
- What are the advantages and disadvantages of regionalization?
- What is “health” and what does “health care” entail?
- Does the *Canada Health Act* provide sufficient “health care” to achieve “health”?
- Is our health insurance system, as a whole, equitable when it comes to ensuring Canadians are “healthy” and receive adequate “health care”?
- If we can't provide all health services to everyone, on what basis should we decide what to provide and to whom?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 1, pp. 17 – 31, 35 – 50, 54 – 60.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- Introduction to the course –
 - What health law is
 - How classes will be conducted
 - Discussion of all assignments
- Jurisdiction –
 - The importance of determining authority
 - Federal v. provincial jurisdiction over health
 - *ss. 91 and 92 of the *Constitution Act* (Canada)
 - Regionalization
 - *Health Authorities Act*, ss. 1 – 5.1
 - *H.E.U. v. Northern Health Authority* (2003 BCSC)
 - Local Governments
 - *Local Government Act* (s. 523)
 - *Community Charter* (s. 8 (3) (i))
 - *Vancouver Charter* (s. 330)
- Funding –
 - What is “health” and “health care”
 - Health insurance – federal
 - **Canada Health Act*
 - *BCGEU v. BC (MoHS)* (2005 BCSC)
 - Health insurance – provincial
 - *Medicare Protection Act*, ss. 1 – 18, 45
 - *Hospital Insurance Act*, ss. 1 – 5, 8 – 13
 - *Continuing Care Act*, ss. 1 – 6
 - Physician Master Agreement 2007
 - Controlling costs of provincial health insurance
 - *Waldman v. British Columbia (MSC)* (1999 BCCA)
 - *Yu v. British Columbia* (2003 BCSC)

- *Eldridge v. BC (AG)* (1997 SCC)
- *Auton v. BC (AG)* (2004 SCC)
- *Armstrong v. British Columbia (MoH)* (2008 BC HR Tribunal)
- Health insurance – private
 - **Chaoulli v. Quebec* (SCC 2005)

Class 2 – Sept 19

PROTECTING PATIENTS

(Guest lecturer scheduled: Mary Falconer, solicitor, Ministry of Attorney General)

CLASS CONTENT:

The topics to be covered in this class include the following:

- regulation of public and private hospitals, and residential community care facilities;
- self-regulation of health care providers;
- other mechanisms to protect or enhance patient safety.

CLASS OBJECTIVES:

The objectives of this class are as follows:

- to explore the various methods used to attempt to protect patients and enhance patient safety;
- to consider what steps are available to address both individual and systemic complaints about the quality of health care, and the effectiveness of any particular step in addressing patient concerns.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- Different regulatory schemes apply to public and private hospitals and community care facilities. What impact on patient care, if any, results from this disparity? Is the disparity justified?
- Does the creation of separate Colleges for each health care profession, having separate standards but overlapping scopes of practice and titles, enhance or impede effective delivery of health care?
- What are the advantages and disadvantages of self-regulation, and is self-regulation adequate to protect the public?
- To what extent are the *Patients Bill of Rights*, quality assurance committees, and the *Patient Care Quality Review Board Act* valuable for the purpose of protecting and enhancing patient safety, or resolving patient concerns about the quality of health care?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 2, pp. 75 – 79, 84 – 104, 106 – 112.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- Regulation of health care institutions –
 - Public and private hospitals
 - *Hospital District Act*
 - *Hospital Act*
 - Residential community care facilities
 - *Community Care and Assisted Living Act* & Residential Care Regulation
- Regulation of health care providers –
 - Recognizing health professions
 - *s. 1 & Part 2 of the *Health Professions Act*
 - regulations made under the *Health Professions Act*
 - Competency and discipline
 - *Part 3 of the *Health Professions Act*
 - *Eng v. College of Physical Therapists (BC)*, (2000 BCSC)
 - *Krop v. College of Physicians and Surgeons (Ont)*, (2002 SCJ DivCt)
 - *Larre v. College of Psychologists (British Columbia)*, (2007 BCSC)
 - *Abrahams v. College of Physicians & Surgeons (BC)*, (2006 BCSC)
 - *Q. v. College of Physicians and Surgeons (BC)*, (2009 SCC)
- Other mechanisms to protect patients and respond to concerns
 - *Patients Bill of Rights*
 - *Schedule to the *Community Care and Assisted Living Act*
 - Quality Assurance Committees
 - s. 51 of the *Evidence Act*
 - *D. (K.) v. BC's Women's Hospital & Health Centre*, (2003 BCSC)
 - *Sinclair v. March*, (2000 BCCA)
 - Patient Quality Review Offices and Boards
 - **Patient Care Quality Review Board Act*

Class 3 – Sept 26

CONSENT & NEGLIGENCE

CLASS CONTENT:

The topics to be covered in this class include the following:

- the doctrine of informed consent;
- medical negligence.

CLASS OBJECTIVES:

The objectives of this class are as follows:

- to identify the elements required for “informed consent” to health care;
- to consider whether a focus on rights instead of needs is a legal barrier to good health care;
- to explore whether litigation is a good option for patients seeking a remedy to the receipt of poor health care, and whether litigation increases the quality of patient care generally.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- To what degree is the Doctrine of Informed Consent more symbolic than meaningful? Do patients really exercise autonomy, or is the medical model still well entrenched?
- Is the wolf guarding the henhouse when the profession gets to set legal standards as well as clinical standards? Can legal and clinical standards be separated?
- Why do courts generally find that patients would proceed with the recommended course of health care anyway despite a lack of proper disclosure? To answer, consider what sorts of factors the court might take into account in determining
 - whether a reasonable person would proceed?
 - whether a particular patient would proceed?
- What steps can be taken to shift from a culture of blame to a culture of learning? Should litigation be abolished as a tool for redressing medical negligence?
- Is the concept of vicarious liability still valid, or should it be abolished?
- Is the defence of contributory negligence fair, given the other obstacles to success faced by plaintiffs?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 3, pp. 117 – 120, 122 – 148; Ch 4, pp. 153 – 154, 162 – 184.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- The doctrine of informed consent –
 - **Health Care (Consent) and Care Facility (Admission) Act*, ss. 1 – 9
- Medical negligence –
 - Duty of care
 - Standard of care
 - *Good Samaritan Act*
 - *ter Neuzen v. Korn*, (1995 SCC)
 - *Reibl v. Hughes*, (1980 SCC)
 - Damages
 - *Health Care Costs Recovery Act*
 - Causation
 - *Snell v. Farrell*, (1990 SCC)
 - The duty to disclose errors
 - *Apology Act*
 - The liability of hospitals (direct v. vicarious)
 - Defences to negligence claims
 - *Limitation Act*
 - Protection and indemnity
- Discussion of assignment #1 (Memo to client)

Class 4 – Oct 3

CONSENT & INCAPABILITY

(Memo to client due)

CLASS CONTENT:

The topics to be covered in this class include the following:

- consent during emergencies;
- consent of a minor;
- substitute consent.

CLASS OBJECTIVES:

The objectives of this class are as follows:

- to explore how law addresses consent requirements in respect of patients who lack capacity;
- to consider the extent to which the law respecting consent adheres to ethical values of autonomy, dignity and bodily integrity.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- Consider various scenarios in which a person may have reduced capacity or be incapable – how do such scenarios affect the application of the doctrine of informed consent?
- Is the current approach to dealing with consent in relation to health care for minors reasonable, or would a different approach be more appropriate?
- Should substitute consent be based on a patient’s best interests or pre-expressed capable wishes?
- Advance directives preserve ethical values but are inconsistent with the doctrine of informed consent. How could the law have addressed this inconsistency, and should it have done so?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 4, pp. 191 – 194 (readings from the previous week are also relevant).

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- Downfalls of the doctrine of informed consent
- Emergency situations
 - *Health Care (Consent) and Care Facility (Admission) Act*, ss. 12 – 12.2
- Therapeutic privilege
- Consent by minors
 - **Infants Act*, s. 17
 - *Child, Family and Community Services Act*, s. 29
 - *B. (S.J.) v. BC (Director of CFCS)*, (2005 BCSC)
- Temporary substitute decision makers
 - **Health Care (Consent) and Care Facility (Admission) Act*, ss. 16 – 19
- Other substitute decision makers – committees, guardians and representatives
 - *Patients Property Act*
 - *Fleming v. Reid*, (1991 ONCA)
 - *Adult Guardianship and Planning Statutes Amendment Act, 2007*, S.B.C. 2007, c. 34, s. 4 (repeals and replaces Part 2 of the *Adult Guardianship Act*)
 - **Representation Agreement Act*, ss. 7, 9 & 16
- Advance directives
 - **Health Care (Consent) and Care Facility (Admission) Act*, s. 9, Part 2.1
- Discussion with students, on an individual, first-come, first-served basis, of topics for research papers (students are not required to discuss their topics with the instructor – students who do not desire assistance need not remain in class).

Class 5 - Oct 17

MENTAL HEALTH

CLASS CONTENT:

The topics to be covered in this class include the following:

- detention and treatment – civil context;
- detention and treatment – criminal context.

CLASS OBJECTIVES:

The objective of this class is as follows:

- to explore the tension between protecting individual interests of liberty and autonomy and protecting the individual and society from harm.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- What is “mental illness”, and is it any different, in terms of its impact on individuals or how it affects society, than any other sort of loss of capacity?
- Are the criteria for involuntary detention under the *Mental Health Act* problematic?
- Do the standards and procedures associated with involuntary detention under the *Mental Health Act* achieve a good balance between protecting liberty interests and the duty to protect individuals and society?
- Do the standards associated with treatment for persons involuntarily detained under the *Mental Health Act* achieve a good balance between protecting autonomy and the duty to protect individuals? Would it make more sense to simply use the usual model for consent to health care?
- Are the standards and procedures associated with detention under Part XX.1 of the *Criminal Code* a good balance between protecting liberty interests and the duty to protect society?
- In cases where mental illness is linked to criminal behaviour, would society be better protected if treatment were mandatory? Would mandatory treatment violate the rights of the accused too severely? What protections could be put in place to balance protection of society and the autonomy of the accused?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 8, pp. 341 – 375.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- What is mental illness
- Autonomy and *parens patriae*
- Detention in the civil context
 - **Mental Health Act*
 - **McCorkell v. Riverview Hospital* (1993 BCSC)
 - **Mullins v. Levy* (2009 BCCA)

- Treatment in the civil context
 - *Mental Health Act*
 - *Mullins v. Levy* (2009 BCCA)
 - *Sparks v. Vancouver Coastal Health Authority* (2006 BC Human Rights Tribunal)
 - **Starson v. Swayze* (2003 SCC)
- The criminal context
 - unfit to stand trial (“unfit”)
 - not criminally responsible on account of mental disorder (“NCR”)
 - Part XX.1 of the *Criminal Code*
- Dispositions and detention under Part XX.1
 - *Winko* (1999 SCC)
 - *R. v. Owen* (2003 SCC)
- Treatment under Part XX.1
 - *Mazzei* (2006 SCC)
- Discussion of assignments
 - Review of assignment #1 (Memo to client)
 - Discussion of assignment #2 (Report to senior lawyer)

Class 6 – Oct 24

HEALTH INFORMATION

(Report to senior lawyer due)

CLASS CONTENT:

The topics to be covered in this class include the following:

- the common law duty to protect confidentiality;
- the statutory duty to manage privacy.

CLASS OBJECTIVES:

The objectives of this class are as follows:

- to explore how technology has affected the legal and ethical principles surrounding “privacy”;
- to explore the tension between protecting individual interests of privacy and autonomy and providing better care.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- What is “personal health information” and why should it be protected?
- Should courts recognize an action for negligent violation of the duty of confidentiality? Would such a claim be viable?
- Which protects privacy and furthers autonomy more – the common law duty to protect confidentiality or the statutory duty to manage privacy?
- Is the expansive authority to collect, use and disclose personal information in the *Personal Information Protection Act* and the *Freedom of Information and Protection of Privacy Act* justified?
- What are the advantages and disadvantages of electronic health records and the sharing of those records between health care providers and other persons (e.g., government, researchers, etc.)?
- The Office of the Information and Privacy Commissioner has been urging government to designate both PharmaNet and PARIS as health information banks under the *E-Health (Personal Health Information Access and Protection of Privacy) Act*. Would doing so increase protection of privacy?
- Are the increased rights associated with the “disclosure directive” just illusory? Should their use be more widely available? What problems are there with their use?
- Are you satisfied that our regulatory regime sufficiently balances the needs of health service and health care providers to access the information they need and the interests of individuals in protecting their privacy and promoting their autonomy? What improvements should be made?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 6, pp. 254 – 258, 261, 262 -267, 274 – 279, 283 – 284, 288 – 291.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- What is personal health information
- Common law duties
 - duty to protect confidentiality
 - *Halls v. Mitchell* (1928 SCC)
 - *McInerney v. MacDonald* (1992 SCC)
 - *Privacy Act* (British Columbia)
 - duty to disclose potential harm
 - *Tarasoff* (1974, CaliforniaSC)

- *Smith v. Jones* (1999 SCC)
- Statutory duties
 - duty to manage privacy
 - legislative framework – Acts of general application
 - *Personal Information Protection and Electronic Documents Act* (Canada)
 - *Privacy Act* (Canada)
 - **Personal Information Protection Act*, ss. 10 – 23
 - **Freedom of Information and Protection of Privacy Act*, ss. 4, 19, 26, 32 – 36
 - legislative framework – Acts of specific application
 - *Ministry of Health Act*, Part 2
 - **E-Health (Personal Health Information Access and Protection of Privacy) Act*, ss. 1 – 10, 18
 - health records – record keeping and system integrity
 - Ministerial Order 237/2009
 - *Pharmacy Operations and Drug Scheduling Act*, ss. 13 to 16.1
 - rights of individuals to control their personal information
 - *Ares v. Vernon* (1970 SCC)
 - Disclosure Directive Regulation under the *E-Health Act*

Class 7 – Oct 31

PUBLIC HEALTH

(Guest lecturer scheduled: Dr. Brian Emerson, Ministry of Health Medical Consultant)

(Outline & bibliography due)

CLASS CONTENT:

The topics to be covered in this class include the following:

- the state's duty to protect and promote public health;
- the *Public Health Act*;
- use of public health regimes to protect the vulnerable.

CLASS OBJECTIVES:

The objectives of this class are as follows:

- to appreciate the impact of public health in relation to individual health;
- to explore the breadth and limits of state powers to protect and promote public health;
- to consider whether state powers may be used to increase health equity.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- What do we mean by “public health” and why is it an important concept?
- Is it fair that individuals who are harmed by government policy decisions meant to serve public interests cannot successfully sue for compensation? What would the result be if the courts did extend a public duty to protect and promote population health to a private duty to protect and promote individual health?
- *Jongerden* is now the subject of a constitutional challenge – the claimants are arguing that it is contrary to s. 7 of the *Charter* to prohibit distribution of raw milk, as there are health benefits to drinking it and persons should be able to choose the milk that is best for them. Is the prohibition contrary to s. 7, and if so, would that prohibition be saved under s. 1?
- Is the regime enabled by the *Public Health Act* too broad, in that almost anything could be prescribed as an “infectious agent”, a “hazardous agent”, a “health hazard” or a “health impediment” and due to the standards of causation and association?
- Do the tools available under the *Public Health Act* fairly balance individual interests in privacy, autonomy and liberty and the state’s duty to protect and promote public health?
- Should those responsible for the care of vulnerable people be required to be vaccinated against infectious diseases?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 3, pp. 148 – 151; Ch 12.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- What is public health
- The duty of the state to protect public health
 - *Williams v. Canada (AG)* (2009 ONCA)
 - *Abarquez v. Ontario* (2009 ONCA)
- The *Public Health Act*
 - **Public Health Act*
 - Who has authority to act
 - What matters may be dealt with under the Act
 - **Fraser Health Authority v. Jongerden* (2010 BCSC)
 - *Hudson* (2001 SCC)

- What can be done under the Act
 - *RJR MacDonald* (1995 SCC)
- Use of public health regimes to protect the vulnerable
 - *PHS Community Services Society v Canada* (2010 BCCA)
- *Interior Health Authority v. B.C.N.U.* (2006, BC Arbitration Board)
- Discussion of assignments
 - Review of assignment #2 (Report to senior lawyer)
 - Discussion of assignment #3 (Policy brief)

Class 8 - Nov 7

E-HEALTH

CLASS CONTENT:

The topics to be covered in this class include the following:

- what is e-Health;
- the challenges to traditional legal concepts created by technological advance.

CLASS OBJECTIVES:

The objective of this class is as follows:

- to explore how changes in technology affect the delivery of health care and traditional legal concepts in relation to professional regulation, medical negligence and the doctrine of informed consent.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- How has technology changed the delivery of health care and what implications do these changes have for traditional legal concepts such as professional regulation, negligence and consent?
- Our regulatory model is designed to ensure patient safety by ensuring that minimum standards of competency, privacy, ethics, etc., are met. How is that model challenged if the patient and provider are in different jurisdictions when health care is rendered (e.g., when a British Columbia pharmacist provides mail-order drugs to a patient in Washington State)?
- Recall the elements the plaintiff must prove to make out a case of medical negligence. How does the introduction and use of new technology and telehealth affect the duty and standard of care?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 2, pp. 104 – 106; Ch 11, pp. 501 – 504, 511 – 519, 524 – 532.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- Completion of public health material (if not finished in previous class)
- What is “e-Health”
- Challenges presented by technological advance
 - jurisdictional and cost challenges
 - challenges to professional regulation
 - clinical and ethical standards
 - *College of Opticians (BC) v. Coastal Contacts* (2009 BCCA)
 - scope of practice
 - **College of Opticians (BC) v. Moss* (2001 BCSC)
 - regulation of health care providers across jurisdictions
 - challenges to medical negligence concepts
 - duty of care
 - standard of care
 - *Leaker v. Porter* (2001 BCSC)
 - *Huisman v. MacDonald* (2005 OSCJ (affr by CA))
 - **Poole v. Morgan* (1987 AICQB)
 - challenges to informed consent
- Whether challenges require incremental or fundamental changes to traditional legal concepts
- Discussion with students, on an individual, first-come, first-served basis, of progress on research papers (students who do not desire assistance need not remain in class).

Class 9 – Nov 14

END OF LIFE ISSUES

(Policy brief due)

CLASS CONTENT:

The topic to be covered in this class is the following:

- how law addresses persons who act, or fail to act, in a manner that causes or contributes to the ending of another person's life.

CLASS OBJECTIVES:

The objectives of this class are as follows:

- to explore whether distinctions in law between withholding and withdrawing care necessary to sustain life, palliative care causing death, assisted suicide and euthanasia are valid;
- to consider whether the laws in this area should be changed.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- What does it mean for a person to be “alive”?
- As the *Criminal Code* does not have a specific exemption for withholding or withdrawing the necessities of life, should it be read in?
- The principle of double effect holds that the intent of palliative care – to relieve suffering rather than cause death – is ethically justifiable and thus the fact of causing death is legally irrelevant. Is this principle valid?
- Should assisted suicide be legalized? If so, what safeguards are necessary?
- Which is more “humane” and consistent with the value of autonomy – palliative care or euthanasia? If assisted suicide were legalized, should euthanasia also be legalized?
- If we legalize assisted suicide and euthanasia, would doing so imply that the lives of the ill and vulnerable are de-valued, or that they are fair targets of discrimination? Would it reduce our commitment to care for the dying, especially given increasing restraints on resources?
- The court in *Latimer* found that imposing the mandatory minimum sentence of life without parole eligibility for 10 years was necessary for general deterrence. How strong is this argument?
- What factors influence sentencing for convictions of assisted suicide and, in comparison, was Mr. Latimer's sentence fair?
- If assisted suicide and euthanasia continue to be criminalized, should there be a mandatory minimum sentence for euthanasia? For either charge, what factors should influence sentencing?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 9, pp. 385 – 407, 422 – 435.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- The meaning of “life”
- Care, assisted suicide and euthanasia
 - key terms distinguished
 - how law addresses these concepts
 - **Criminal Code*, ss. 215, 219, 222, 226, 229, 241, 245
 - Canadian Medical Association’s Code of Ethics
 - *Nancy B. v. Hôtel-Dieu de Québec* (1992 QueSC)
 - **Rodriguez* (SCC 1993)
 - *Death with Dignity Act, 1997* (Statutes of Oregon State, USA)
 - application of the criminal law and reflections on social values
 - *R. v. Latimer* (2001 SCC)
 - *R. v. Genereux* (1999 SCC)
 - *R. c. Pelletier* (2004 QueCrt)
 - *R. v. Kirk* (2006 ONCJ)
 - *R. c. Houle* (2006 QCSC)
 - *R. (Purdy) v. Director of Public Prosecutions* (2009 House of Lords, UK)

Class 10 – Nov 21

DRUGS & DEVICES

CLASS CONTENT:

The topics to be covered in this class include the following:

- research respecting drugs and devices;
- licensing of drugs and devices;
- ongoing review and product recall.

CLASS OBJECTIVES:

The objective of this class is as follows:

- to explore whether existing regulatory mechanisms are adequate to protect patient safety.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- The regulatory framework for device research requires advance approval, but then has less stringent requirements for conducting the research; the framework for drug research does not require advance approval, but has more stringent requirements for conducting the research. Is this difference justified?
- Does the regulatory framework governing research into drugs and devices (both the official and unofficial frameworks) adequately protect the interests of research participants?
- Is the licensing and approval system adequate to ensure the safety of drugs and devices before they get on to the market?
- Are follow-up requirements in the regulatory regime sufficient? Are drugs and devices being approved too early, without sufficient long-term testing? How could we better balance the need to make important drugs and devices available to patients quickly and the need to protect patients?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 10, pp. 437 – 439, 441 – 446, 450, 468 – 485, 490 – 495.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- Research respecting drugs and devices
 - The official regulatory framework
 - *Food and Drugs Act* (Canada)
 - Food and Drugs Regulation, Part C of Division 5
 - Natural Health Products Regulations, Part 4
 - The unofficial regulatory framework
 - Tri-Council Policy Statement of the Ethical Conduct of Research Involving Humans (“TCPS”)
 - Health Care Consent Regulation (made under the *Health Care (Consent) and Care Facility (Admission) Act*), s. 2

- Special issues raised by research trials
 - negligence
 - doctrine of informed consent
 - commercialization and conflicts of interest
- Licensing of drugs and devices
 - *Attis v. Canada (Minister of Health)* (2008 ONCA)
 - **Vrabc v. College of Physicians and Surgeons (BC)* (2009 BCSC)
 - *Bristol-Myers Squibb Co. v. Canada (AG)* (2005 SCC)
- Ongoing review and product recall
 - **Wuttunee v. Merck Frosst Canada Ltd.* (2009 SKCA)
- Discussion of assignments
 - Review of assignment #3 (Policy brief)
 - Discussion of assignment #5 (Research paper)

Class 11 – Nov 28

GENETICS & HUMAN REPRODUCTION

(Research paper due)

CLASS CONTENT:

The topics to be covered in this class include the following:

- advances and research in genetics, including stem cell research;
- legal issues in respect of reproduction, including assisted human reproduction.

CLASS OBJECTIVES:

The objectives of this class are as follows:

- to explore how medical advances may impact the social fabric;
- to consider whether existing legal frameworks are adequate.

BE PREPARED TO DISCUSS:

Potential topics for discussion include the following:

- How has genetic and stem cell research impacted the debate in respect of what it means to be “human” and the value of human “life”? Consider biological, ethical, and sociological perspectives as well as legal ones, and how genetic and stem cell technologies may be misused.

- Is it sufficient to protect human health and dignity that stem cell research is largely governed by policy guidelines rather than having an official, legally enforceable framework?
- Should we permit the patenting of higher life forms, such as the Harvard Mouse? If so, should this extend to genetic alterations in human genes?
- If *Re Eve* were decided today, would the court have reached the same conclusion given current views about children, parenthood, autonomy, incapacity, and other factors?
- If a pregnant woman chooses to continue a pregnancy and, during the pregnancy, harms the foetus by her actions or omissions, should she be held liable in negligence? Should the state have the authority to take coercive measures to stop the harmful behaviour?
- The court in the *Assisted Human Reproduction Act Reference* was split as to the constitutionality of those activities for which a licence was required. Which side had the stronger argument?

The McLachlin camp argued that the controlled activities were a valid exercise of the criminal law power because they involved an issue of fundamental moral importance and techniques that could be highly dangerous to human health and intrinsic human characteristics.

The LeBel camp argued that the controlled activities were not a valid exercise of the criminal law power because they imposed national standards on the delivery of a health service, a matter solely within provincial jurisdiction, rather than suppressing a moral or health “public evil”.

- Who should be a child’s legal parents if A donates the sperm; B donates the ovum (egg); C carries the resulting foetus to term and gives birth to the child; D and E are the intended parents?
 - what about if the surrogate agreed at the time of implantation of the embryo to surrender the child to the intended parents, but she changes her mind when the child is born and wants to keep it?
 - what about if the donor agreed to donate reproductive material on the understanding that the intended parents would raise the child, and the evidence is clear that the donor would not have donated the material if the surrogate kept the child?

READING ASSIGNMENTS:

Students are expected to have read the following in the text: Ch 7, pp. 295 – 310, 319 – 340; Ch 11, pp. 504 – 511, 519 – 524.

In addition, students may benefit from reviewing briefly the legislation and case headnotes set out in the section entitled “Class Structure”, especially those indicated with an asterisk (*).

CLASS STRUCTURE:

The class is expected to proceed as follows:

- Genetics and stem cell research
 - stem cell research
 - issues respecting intellectual property
 - *Harvard College v. Canada (Commissioner of Patents)* (2002 SCC)
- Human reproduction

- Abortion
- Contraception and sterilization
 - **Re Eve* (1986 SCC)
- Duties of pregnant women
 - *Dobson* (1999 SCC)
 - *Winnipeg v. G* (1997 SCC)
- Assisted human reproduction
 - **Assisted Human Reproduction Act* (Canada), ss. 2, 5 to 13
 - **Reference re Assisted Human Reproduction Act* (2010 SCC)
- Legal impacts of assisted human reproduction technology
 - *Rypkema v. British Columbia* (2003 BCSC)
 - *N. (B.A.) v. H. (J.)* (2008 BCSC)

Chapter 3:

CLASS PARTICIPATION

CLASS PARTICIPATION

In addition to meeting academic requirements, this class has been designed to provide students with an opportunity to learn and practise the skills that will be required after graduation. One of these skills is verbal communication.

Practising lawyers, as well as those in business and other positions commonly occupied by former law students, are frequently called on to speak. Even if not a litigator, it is quite likely that you will need to meet with clients and colleagues and provide information or opinions, analyze and critique the opinions of others (in the most respectful way, of course), and make recommendations. Effective communication skills are necessary for a successful career.

There are various ways in which you can acquire public speaking skills. Presentations and debates are 2 examples, but they target very specific skills. Instead, this class will provide to students the opportunity to practise general communication skills – the sort that every lawyer is called on to exercise regularly.

To this end, questions that will form the basis of class discussions are included in each class description. Other topics may come up as well. As your instructor, I will be encouraging everyone to participate. It won't be a "pop quiz" or "Socratic method" style, but rather an open-ended "What do you think?" style. In addition to making the class more interesting and focusing your learning during reading assignments, speaking in class will help you to prepare for life after school.

I chose deliberately not to make participation mandatory. For starters, the evaluation of "participation" is ridiculously subjective. More importantly, learning this particular skill is best done in a low-pressure environment. While some people speak freely about anything (and some seem compelled to speak freely about everything), others are not comfortable speaking out. I want you to think and, especially, to take risks – offer your thoughts, even if you may not fully understand; offer your opinions, even if others may disagree; offer your critiques (respectfully), even if you may in turn be asked to justify your own position; offer your recommendations, even if you aren't certain of their viability.

Speak – your skills and comfort level will increase only with practise.

IF PUBLIC SPEAKING REALLY ISN'T YOUR THING:

For many people, public speaking is uncomfortable. From some, even responding to their name at roll call is challenging. While I generally hope for volunteers, I may occasionally single someone out. But, I will not force anyone to speak – if you don't wish to say anything, just shake your head.

That being said, I cannot emphasize enough the importance of this skill. Try – even if you hate it! Here are some of the things you can do that might help:

- prepare – review the questions posed in the class descriptions and think of a couple of things to say and how you might say them, and what others might say and how you might respond
- practise – discuss the questions with your friends and family (even people who don't know anything about law usually have something to say about health issues)
- set goals – try to raise your hand and speak at least once in each class (twice as we get further along and you become more comfortable)

- stage discussions – there is no grade for participation, so it would not be academically dishonest to ask a colleague to prompt you (“If you bring up this point, then I’ll respond this way... ”)
- request a right of first refusal – if you are uncomfortable with asserting yourself but would like to ensure a chance to get a word in before somebody else says what you wanted to say, send me a note asking to be recognized early when the discussion starts
- consider what coping mechanisms work for you – there may be things you can do to reduce the stress that public speaking (or even the thought of it) causes. Some of the things that work for others include
 - having something in your hand to hold or squeeze while you speak (make sure it’s quiet!)
 - diffusing potential tension by re-casting strong statements (i.e., phrase your response to someone else’s suggestion as a question – instead of a critique, it is a request for greater understanding)
 - positioning yourself strategically (increase comfort by sitting beside someone calm; increase assertiveness by straightening your back and squaring your shoulders)
 - partitioning your thoughts (put a little part of your mind somewhere else – think of a neutral image, like a hockey net, that you can shift some of your focus to without losing your concentration on what you are saying)
 - breathing (people under stress forget to do this as regularly and deeply as they should – your listeners will give you a chance to draw a breath, so take advantage of it).

Chapter 4:

ASSIGNMENTS

INTRODUCTORY NOTE

Assignments #1 to 3 (the memo to client, the report to senior lawyer and the policy brief) are likely different from many of the assignments you have been given in law school to date. They require you to

- think analytically and critically, and perhaps creatively,
- meet very tight deadlines, and
- meet very strict word limits.

These requirements were constructed quite deliberately: to teach you practical writing skills; and to introduce you to some of the demands and constraints that you will face after graduation. For instance, it is seldom the case that a client will actually *tell* you what they need to know – you need to figure it out from what they say. It is rare that you will be given 3 months to respond to a request – the week to 2 weeks provided here is being generous.

You will likely find that it is not so much the content that is challenging in respect of these assignments, but rather the amount of focus you will require, in terms of both your thinking and your writing, to complete them well.

Assignments #4 and 5 (the outline & bibliography and the research paper), are more typical of your law school experience. Note, however, that some of the skills you acquire in completing assignments #1 to 3 will assist you in writing a good paper: identifying an issue; developing a position based on legal principles; and situating law within its policy context. Thus, view each assignment as a building block for the next and apply the skills you have learned in each.

REQUIREMENTS FOR ALL ASSIGNMENTS

All students must adhere to the following requirements in respect of each assignment:

SUBMISSION:

Two copies of each assignment must be submitted at or before the start of class on the due date:

- a paper copy must be handed directly to the instructor;
- an electronic copy, readable in Microsoft Word, must be e-mailed directly to the instructor.

If you are unable to attend class when an assignment is due, please arrange with a colleague to provide the paper copy to me.

I will acknowledge receipt of your electronic copy before 11 p.m. on the date the assignment is due. If you have not received an acknowledgment, please confirm with me that I have received the electronic copy.

A student who fails to deliver BOTH copies at or before the start of the class on the due date will be considered late and a penalty will be assessed accordingly.

FORMAT:

All assignments must use 8.5" x 11" paper, 1" margins, and Times New Roman in 12 point font, and must include page numbers (for the research paper, it does not matter whether the cover page is paginated). Students may use a different font and font size for headings.

Each assignment must have all of the following cover information:

- [Your name]
- Health Law 343, Fall 2011
- Assignment [#]: [Description (i.e., Memo to client)]
- Due: [Date], 2011
- Instructor: S. Verhulst
- Word count: [#]

WORD COUNT:

I will be using a recent version of Microsoft Word to check word counts. Students using a different program should check the algorithms used by their software against those used by MS Word, so as not to inadvertently exceed the maximum word count when that count is checked in MS Word.

The following are not to be included in the word count:

- the cover information listed above;
- page numbers;
- footnotes;
- the bibliography for assignment #4.

FOOTNOTES:

If notes are appropriate to the assignment, they should appear as footnotes rather than endnotes or embedded notes.

For the research paper, students must use proper citation style as set out in the most recent edition of the *Canadian Guide to Legal Citation* (also known as the *McGill Guide to Legal Citation*). Failure to use proper citation style will adversely affect the student's grade.

If footnotes are used for assignments #1 to 4, it is acceptable to use the following style:

- author, date, page #;
- *Act*, section #;
- case name;
- class name, date and topic.

PENALTIES:

Penalties will be assessed as follows:

- failure to meet due dates without prior approval from the instructor – deduction of 5% of the maximum grade available for the assignment, for each day or part of a day that the assignment is late;
- exceeding the word count – that part of an assignment that exceeds the maximum word count will not be read and will not be counted towards the student's grade;
- failure to follow a submission or format requirement as set out in this Manual – deduction of 5% of the maximum grade available for the assignment.

Note that penalties are cumulative – i.e., a student who hands in a late assignment and fails to follow format requirements will be assessed both the 5% deduction per day (or part of the day) for the late penalty AND the 5% deduction for the failure to follow format requirements.

The value of a 5% deduction is as follows:

- Assignment #1 (Memo to client): 0.25
- Assignment #2 (Report to senior lawyer): 0.5
- Assignment #3 (Policy brief): 0.75
- Assignment #4 (Outline & bibliography): 0.25
- Assignment #5 (Research paper): 3.25

Assignment #1

MEMO TO CLIENT

(Due Class 4 – October 3)

ASSIGNMENT OBJECTIVES:

The objective of this assignment is to learn how to convey useful and understandable information to a person who has little to no experience with the law or the legal system. In particular, students will have the opportunity to practise the following skills:

- to identify and focus on client needs;
- to extract the essence from a large amount of complex information;
- to respond quickly to client requests;
- to shape one's writing to the target audience.

ASSIGNMENT:

Following Class 3, you will be given a fact scenario. The scenario will feature a client who has come to you seeking legal advice. You must prepare a memo in response, providing the requested advice.

ADMINISTRATIVE DETAILS:

Basis of assignment: Students are expected to base their responses on the lectures (including the guest lecture, if there is one) and class discussion from Classes 2 and 3. The assigned readings from those classes may be of assistance. No additional research is expected.

Format: Your response must take the form of a memo to a client. Where company letterhead would normally be placed, please include the “cover information” listed on page 37 of this Manual. In addition to the general requirements set out in this Manual, your assignment may be single spaced.

Word count: Your assignment is expected to be at least 400 words, and must not exceed 500 words.

EVALUATION:

Your grade (worth 5% of your final grade) will be based on the following:

- Substantive content – the degree to which you
 - successfully identify what advice the client is seeking, and
 - respond accurately, with sufficient information to enable the client to make a decision based on your advice;
- Writing – the clarity and professionalism with which your writing imparts complex information.

Assignment #2
REPORT TO SENIOR LAWYER

(Due Class 6 – October 24)

ASSIGNMENT OBJECTIVES:

The objective of this assignment is to learn how to identify and evaluate the relationship between ethical and legal principles and law. This is the basis for a fundamental analytical skill: arguing principle rather than precedent. Arguments based on principle are far more likely to persuade others, even in the face of adverse precedents, than arguments that merely parrot a string of case law.

In particular, students will have the opportunity to practise the following skills:

- to identify how ethical and legal principles are expressed in law;
- to evaluate the degree to which law conforms to ethical and legal principles;
- to respond quickly to supervisors and colleagues;
- to shape one’s writing to the target audience;
- to venture an opinion and a recommendation on a legal position.

ASSIGNMENT:

Following Class 5, you will be given an e-mail from a senior lawyer. The lawyer requests a briefing on a particular question of law, and asks you to give your thoughts on what principles should be argued and whether the law conforms to those principles.

ADMINISTRATIVE DETAILS:

Basis of assignment: Students are expected to base their responses on the lectures and class discussion from Classes 4 and 5, as well as on the readings from those classes. No additional research is expected.

Format: Your response must take the form of a memo to a senior lawyer. Where company letterhead would normally be placed, please include the “cover information” listed on page 37 of this Manual. In addition to the general requirements set out in this Manual, your assignment may be single spaced.

Word count: Your assignment is expected to be at least 600 words, and must not exceed 750 words.

EVALUATION:

Your grade (worth 10% of your final grade) will be based on the following:

- Substantive content –
 - the accuracy and completeness, but precision, with which you describe the relevant law,
 - your analytical skills in respect of identifying and evaluating the relationship between ethical and legal principles and law,
 - how you relate your opinion of the law, and support that opinion, to the analysis referred to above, and
 - the extent to which your recommendation, based on your opinion, can be used by the lawyer as the basis of a principled argument in respect of the matter presented;
- Writing –
 - the clarity and professionalism with which your writing imparts complex information, and
 - the manner in which your analysis proceeds (i.e., flow, logical progression between concepts, etc.)

Assignment #3

POLICY BRIEF

(Due Class 9 – November 14)

ASSIGNMENT OBJECTIVES:

The objective of this assignment is to learn how to identify and evaluate the relationship between policy issues and law. Law does not exist in a vacuum: it is a response to a social problem. As such, understanding law requires an understanding of the policies that lie beneath it. In turn, understanding policy permits the effective use of law as a tool to solve social problems.

In particular, students will have the opportunity to practise the following skills:

- to identify policy issues;
- to explore the relationships between policy, ethical and legal principles and law;
- to make a proposal that uses law to address policy issues.

ASSIGNMENT:

You are an analyst with the Ministry of Health. Following Class 7, you will be given an e-mail from the Deputy requesting a briefing note for the Minister. You will be given a policy problem and asked to submit options and a recommendation based on powers under the *Public Health Act*.

ADMINISTRATIVE DETAILS:

Basis of assignment: Students are expected to base their responses on the lecture (including the guest lecture), assigned readings and class discussion from Class 7, as well as on any relevant material from previous classes. Parts 1, 2, 3 and 9 of the *Public Health Act* should be carefully scrutinized.

No additional research is expected, but students are advised to consult the materials provided in the Deputy's e-mail for background information.

Format: Your response must take the form of a policy briefing note. Where Ministry letterhead would normally be placed, please include the "cover information" listed on page 37 of this Manual. In addition to the general requirements set out in this Manual, your assignment may be single spaced.

Word count: Your assignment is expected to be at least 800 words, and must not exceed 1000 words.

EVALUATION:

Your grade (worth 15% of your final grade) will be based on the following:

- Substantive content –
 - the comprehensiveness with which you identify the relevant policy issues
 - the balance you strike between creativity and viability in respect of the policy options you provide,
 - your analytical skills in respect of identifying and evaluating the relationships between policy issues, ethical and legal principles and law, in respect of each policy option, and
 - your ability to frame a recommendation in a manner that would be viable if transformed into subordinate legislation under the *Public Health Act*;
- Writing –
 - the clarity and professionalism with which your writing imparts complex information,
 - the manner in which your analysis proceeds (i.e., flow, logical progression between concepts, etc.), and
 - the precision with which you address a large, and potentially open-ended, topic.

OTHER MATTERS:

A policy analyst would typically devote as much time as possible to researching the subject matter and consulting with experts before preparing a policy brief. They would be expected also to include statistics, figures and other “hard” data. Given the timelines for this assignment, and that this is a law course and not a policy course, students are not asked to do extra research nor expected to give hard data beyond what is provided in the links accompanying the Deputy’s e-mail. Necessarily, this will mean that you will have to exercise some creativity and common sense.

As an example, economic issues are always a relevant policy consideration. For the purposes of this assignment, you do not need to estimate in dollar figures how much each policy option you present might cost to implement – such an assessment that would normally follow after consultation with a financial analyst. But, you are expected to know intuitively that all programs, services, and regulatory strategies cost *something*; that some are likely to cost more than others; and that costs can be increased, decreased or apportioned through different mechanisms. As such, you are still expected to address economic issues.

Assignment #4

OUTLINE & BIBLIOGRAPHY

(Due Class 7 – October 31)

ASSIGNMENT OBJECTIVES:

The objective of this assignment is to assist students in preparing for their research papers.

In particular, students will have the opportunity to practise the following skills:

- to define an issue with sufficient focus that it both guides and constrains further research and argument;
- to plan before acting, including anticipating the direction an argument might take.

ASSIGNMENT:

Your final assignment is to write a research paper on a topic of your choice. Your topic

- must address a matter in health law that is current and relevant to British Columbia (you may address issues within federal jurisdiction, but should address how the interests of British Columbia are affected), and
- must address a “real-life” problem for which you propose a viable solution (i.e., your topic should not be theoretical, historical or exploratory in nature).

In preparation for your research paper, you must submit an outline and a bibliography.

ADMINISTRATIVE DETAILS:

Basis of assignment: Students are expected to have engaged in sufficient preliminary research to enable them to frame their topics and to identify the most relevant source material.

Your assignment must identify at least the following:

- the issue you will be addressing in your research paper;
- the ethical and legal principles, policy issues and law you expect will be most relevant;
- the basic structure of your anticipated discussion and argument;
- a bibliography that shows the most relevant common law, statute law and “grey” literature (articles from legal and other professional journals; government reports; professional reports, guidelines or standards; other reliable sources of information).

Format: Your outline may be written in full sentences or in point form, provided you are consistent and adhere sufficiently to the regular rules of grammar to be understood. Please include at the top of the first

page the “cover information” listed on page 37 of this Manual. In addition to the general requirements set out in this Manual, your assignment may be single spaced.

Word count: Your assignment is expected to be at least 400 words, and must not exceed 500 words.

EVALUATION:

Your grade (worth 5% of your final grade) will be based on the following:

- Substantive content –
 - the degree to which your topic is focused and your discussion well planned, such that further research and the development of your argument will be efficient and effective and a viable solution presents itself, and
 - whether you have identified the most relevant common law, statute law and “grey” literature;
- Writing –
 - whether your outline is well organized and written professionally (note: even if written in point form, formatting should be consistent and your writing free of errors).

OTHER MATTERS:

Choosing a topic:

To choose a topic, you may wish to consider the following strategies:

- speak with friends and family – have they experienced any problems or frustrations in accessing or receiving health care that may be symptomatic of a larger issue?
- visit the websites for the CBC, BBC, Globe & Mail and other (reasonably reputable) media bodies – what news articles or documentaries are they running that are relevant to health?
- visit the websites of (reasonably reputable) health-related bodies to view current initiatives or topics of debate, and consider whether they involve legal issues – examples:
 - the Ministry of Health (British Columbia), Health Canada and bodies related to them (i.e., the BC Centre for Disease Control or the Public Health Agency of Canada);
 - bodies that regulate or advocate for health care providers (i.e., the British Columbia College of Physicians and Surgeons or the Canadian Medical Association);
 - special interest groups, such as the Heart & Stroke Foundation, etc.

If you are having difficulty choosing a topic, please e-mail me as soon as possible and outline your general interests. I’ll make some suggestions.

Relationship between the outline and the final paper:

It is expected that your paper will evolve with further research and writing. While you should take care in preparing your outline, it does not restrict the parameters of your final paper. In preparing your final paper, you may

- narrow, change or expand your focus,
- change the structure of your discussion (including in such a way that you come to an entirely different conclusion),
- choose not to rely on sources listed in your bibliography, and
- refer to additional sources.

If, however, there is a significant change in your topic or in the manner in which you intend to approach it, please advise me as soon as possible.

Assignment #5
RESEARCH PAPER

(Due Class 11 – November 28)

ASSIGNMENT OBJECTIVES:

The objective of this assignment is to give students the opportunity to explore in-depth a topic in health law that is of particular interest to them.

In particular, students will have the opportunity to practise the following skills:

- to identify a “real-life” problem in relation to health care, services or delivery;
- to explore how ethical and legal principles, and policy issues, are expressed in and affect the development of law;
- to present an argument based on principle;
- to propose the use of law to solve a “real-life” problem.

ASSIGNMENT:

You are required to write a research paper on a topic of your choice. In brief, your topic must address a matter in health law that is current and relevant to British Columbia, and that explores a real-life problem for which you propose a viable solution. For further details on choosing a topic, please see the section entitled “Choosing a topic” in the description of assignment #4.

ADMINISTRATIVE DETAILS:

Basis of assignment: Students are expected to base their assignment on relevant common law, statute law and “grey” literature, as well as relevant class lectures and discussions (including guest lectures, if appropriate) and assigned readings. Students should be aware that issues in health law often overlap. As such, even if a research topic appears to be related to one class only, the lectures, discussions and readings from other classes may still be relevant.

Format: Your response must take the form of a formal research paper. Please include a separate cover page that has the “cover information” listed on page 37 of this Manual. You must use proper citation style in your footnotes (see the *McGill Guide to Legal Citation* for proper citation style). In addition to the general requirements set out in this Manual, your assignment must be at least double-spaced.

Word count: Your assignment is expected to be at least 4000 words, and must not exceed 4500 words.

EVALUATION:

Your grade (worth 65% of your final grade) will be based on the following:

- Substantive content –
 - whether your topic addresses a “real-life” problem in relation to health care, services or delivery,
 - the completeness and accuracy with which you describe the relevant law,
 - your analytical skills in respect of evaluating the relationships between the relevant ethical and legal principles, policy issues and law,
 - the skill with which you develop and present an argument, based on principle, that addresses the relevant ethical and legal principles, policy issues, and current law,
 - whether you propose a viable solution to the problem you identified, and your skill in assessing the viability of that proposal,
 - your ability to identify the most relevant source material, and how you use that material to develop or support your argument, and
 - the extent to which you are able to identify weaknesses in source material, and in your argument and proposed solution;

- Writing –
 - the clarity and professionalism with which your writing imparts information,
 - the manner in which your analysis proceeds (i.e., flow, logical progression between concepts, etc.),
 - your use of formatting to provide visual cues and enhance comprehension, and
 - your choice of structure and language, and how it affects comprehension and ease of reading.

GENERAL WRITING TIPS

There are a number of texts available to you that address matters of legal writing. The following information is meant simply to be a quick guide to assist you with your assignments and future legal writing requirements.

GENERAL MATTERS:

Identify the issue and your conclusion or recommendation clearly and succinctly

- Regardless of what you are writing or for whom, within the first paragraph you should identify clearly and succinctly what issue you intend to address.
- Do not assume that the reader knows what the issue is, even if you are responding directly to a person who has asked you a particular question. That person may have forgotten the question, or your research and analysis may have caused you to re-frame the matter put to you.
- In identifying the issue, give thought to whether you should clarify what matters you are NOT addressing. For instance, if the issue is whether a minor may consent to health care and the minor is suffering 2 distinct illnesses, you may need to clarify that you are addressing consent in relation to one illness only.
- Similarly, your conclusion or recommendation should be stated clearly. It is wise to do this both at the start of your writing and at the end. A summary of your conclusion or recommendation at the start serves to orient the reader – all subsequent reading is directed toward reaching that conclusion or recommendation. A more expansive rendering of your conclusion or recommendation at the end is, of course, the natural means of wrapping up your analysis.
- Your conclusion or recommendation should be firm. It does not help your client, your colleague, the Minister, or another reader to use floppy phrases such as “It is possible that X’s claim might succeed, but it might not.” Instead, take a clear position: “My view is that it is more likely than not that X’s claim will succeed.”
- That being said, you must never mislead your reader. If there are qualifications to be made, make them. For instance:
 - While I believe X’s claim will likely succeed, the factors that may prevent X’s claim from succeeding are...
 - In giving my opinion, I have assumed that.... If any of these assumptions are incorrect, my opinion may change.
 - The case of A v. B is currently before the courts and its outcome may affect the viability of X’s claim. I will need to re-examine my opinion when the decision in A v. B is available.

Organize your writing

- All writing should be organized logically. Whether you are writing a client memo or a research paper, your reader needs to be led through your analysis in a careful, systematic manner.
- There are many ways in which your writing may be organized. Do not assume that one way is better than another. As an example, there is a tendency to present facts in chronological order. This works well if the facts all relate as a single history, but not if the facts deal with separate subject matters. The best way to determine the order in which to address matters is simply to consider what things the reader needs to know before other things will make sense.
- A strategic use of headings can work well to orient the reader. A good heading is short, but descriptive. If possible, the heading should summarize the content it relates to. Compare:
 - The Duty of Care
 - Our Client Has a Duty of Care
- There is a danger in using too many headings. There should be sufficient headings that the reader could, by reading the headings alone, get a good sense of the purpose of your writing and the direction you are taking to achieve that purpose. There should not, however, be so many headings that your writing is fragmented.

Write clearly and professionally

- Do not write like a lawyer! Many lawyers seem to believe that legal writing requires complex grammatical structures, archaic phrases, and words with more syllables than sense. This is a lie. Write in such a fashion, and your reader will think you a pompous idiot.
- Choose your words carefully – Do they mean precisely what you intend? Are they readily understandable to the average reader? You need not insult your reader by dumbing down your choice of language, but your reader should not need a dictionary on hand, either.
- Sometimes, technical phrases are required. If this is the case, consider who your likely reader is, and whether that reader is likely to understand. If there is any doubt, use an alternate term or define the term for the reader's benefit. Consider the following examples:
 - In respect of a regulatory offence:
 - To a client: The Crown must prove 2 elements – an act and an accompanying mental component. In your case, the mental component the Crown must prove is that you wilfully, or deliberately, interfered with the inspector during the inspection.
 - To a senior lawyer (a criminal law practitioner): The *mens rea* the Crown must prove in this case is that the accused wilfully obstructed the inspector during the inspection.
 - In respect of the limits of regulatory authority:
 - To a client (an engineer): You have authority to impose setbacks from a berm.

- To a senior lawyer (who does not normally practise in the area): The client has authority to impose limits on building within a specified distance from a berm (a mound of earth erected as a protective barrier).
- Consider whether particular words or phrases are culturally appropriate to your audience. Avoid the use of slang whenever possible.
- Use short sentences and paragraphs, dealing with only one concept in each sentence and paragraph. Studies in psycholinguistics have found that readers digest information most easily if sentences have fewer than 25 words and paragraphs have fewer than 6 sentences. For literary flare, use a mix of sentence lengths.
- Be precise in making your points, and once you have made your point, move on.
- Ensure that your tone is appropriate to your subject matter. This is especially important if you are angry with your client, opposing counsel or another person: your anger may come out in the tone, even if it is not expressed directly.
- Avoid being impolite or engaging in gossip (i.e., “Opposing counsel is a real nutcase – I’ve heard that even his own partners wish they were rid of him”).

Use clean and consistent formatting

- A clean presentation is essential to making readers want to read what you have to say. If your writing looks like a mess, the assumption is that the content is probably a mess also.
- In choosing your font, consider how it will catch your reader’s eye. Consider the following examples:
 - What is your medium?
 - A serif font (with hooks and curls) like Times is easier to read when printed on a page.
 - A sans serif font (without hooks and curls) like Arial is easier to read electronically.
 - Do you need to draw particular attention to the text?
 - A common style, like Times New Roman, reads well in large blocks of text and is generally used for most writing.
 - A less common style, like Verdana, draws the eye and as such is good for headings.
 - What tone do you wish to convey?
 - Professional writing should use a professional-looking style, such as Times.
 - An invitation to a party can be more fun, like Comic Sans.
- Also consider the size of your font. Font that is too small is too hard to read; too large, and it is jarring. An appropriate mix of font sizes can be useful, especially to distinguish headings and subordinate headings from each other, and headings from regular text.

- Similarly, the size of your margins will affect ease of reading. People do not like to read huge blocks of text, so small margins should be avoided. Margins that are too large, however, create skinny paragraphs that require too much eye-shifting.
- The space between paragraphs is a further matter to consider. If your document is single spaced, it is wise to include an extra space between paragraphs. This makes it easier for readers to keep track of where they are on the page. If your document is double spaced, new paragraphs should be indented as a visual cue. If you are writing in point form, consider using variable spacing between different levels of bullets, as follows:
 - There is 6 pt spacing between this sentence and the one above;
 - There is 4 pt spacing between this sentence and the one above;
 - There is 3 pt spacing between this sentence and the one above.
- Whatever your choices, you should implement them consistently. Do not use a mix of fonts and font sizes for the same purpose (i.e., all main headings should be in one font of one font size; there should be the same amount of spacing between all bullets of the same level; etc.)

Proof your writing carefully

- Do not rely on spell-checker! Read your work yourself, paying close attention to each word within its context. Spell-checker does not catch all errors. In addition to making your work look sloppy, it can lead to embarrassment. My personal favourites from my office (which I should note were caught and corrected before the documents left the office) include
 - referring, in venereal disease regulations, to the Director of Pubic Health [should have been Public Health],
 - requiring the installation of soup dispensers in public washrooms [should have been soap dispensers], and
 - permitting the giving of notice by nailing it to a person [should have been by mailing it].
- As you are in Canada, use Canadian spelling. If there is doubt about which spelling is correct, use the one that is most common in Canada.
- Check the spelling of person's names. Our professional success depends on providing good service, and it sends a poor message if you can't even spell your reader's name correctly.
- If you are using a template, be certain that you have removed or changed all information that is not needed or appropriate. Some of the failures I've seen include the following:
 - Dear Sir / Madam: [when the gender of the recipient was known];
 - June 3, 2011-06-03 [manually entering the date, forgetting about auto-entry];
 - *[insert one of the following:]* [instructional text left in the document];
 - page numbers in 2 places [manually inserting page numbers when the template already provides for them].
- If you use "find and replace", check that the result is grammatically appropriate. As an example:

- replacing “animal” with “mammal” – because earlier sentences read “an animal”, there are now sentences that read “an mammal”.
- If you use “cut and paste” to move text in your document, check that you have cut the entire text and pasted it, in its entirety, in the place you intended.

SAMPLE FORMATS AND NOTES ON CONTENT:

When you join a firm or other organization, you will likely be given a series of templates that are used in the office for client memos, contracts, reports, wills, etc. Before using a template, review it to ensure that it is current and well constructed. Many firms fail to update their templates on a regular basis, so they should always be treated as guidelines rather than requirements.

For the purposes of your assignments and future careers, you may wish to consider the sample formats provided in this section.

Memos to clients:

Clients generally are not legally trained and do not care about the intricacies of the law. They want to know the answer to their question without having to wade through a lot of material. Although the length of a response will depend on the complexity of the question, aim for client memos to be 2 pages or less. If the matter is particularly complex, summarize each issue and the conclusion or recommendation on the first page or 2, then provide a deeper discussion on subsequent pages.

One means of structuring a client memo is as follows:

[Letterhead, with your contact information clearly stated]

[Date]

[delivery mode – by mail, courier, e-mail, etc.]

To: [Client’s name, title (if appropriate) and contact info]

From: [Your name and, if appropriate, title]

Re: [One line that summarizes the purpose of the memo]

First paragraph: Summarize what the client has asked of you, and provide a brief answer.

Next: Summarize any important information the client has given you that affects your analysis, such as the facts of the case or any particular concerns the client has expressed. You may also ask your client to confirm matters of which you are uncertain, or you may indicate that you need further information.

Next: Provide your analysis, leading the client from the question to the answer. Give the client sufficient information such that the client will be able to understand the reason for your answer and make a decision based on your analysis.

Next: Identify the client's options (if any), and the advantages and disadvantages of each option.
Recommend the course of action you believe to be in the client's best interests and the reasons for your belief.

Next: Identify what further steps you will be taking, and what further steps your client must take.

[Appropriate salutation, such as "I look forward to our next meeting on July 9th, 2011."]

[Your name]

Memos or reports to colleagues:

Unlike your clients, your colleagues often need a more in-depth exploration of the law so that they fully understand for themselves what the law is rather than merely how it affects the issue they are facing. Thus, it would be appropriate to provide a more detailed analysis of relevant case law or statutory law than one would give to a client.

Still, most of your colleagues are pressed for time. They need to be able to find what they are looking for very quickly, and turn their attention to the details at their leisure. Thus, you should aim

- to write a memo or report of no more than about 3.5 pages, or
- to summarize each issue, the analysis (unlike for the client memo) and the conclusion or recommendation on the first 2 pages, and then provide a deeper discussion on subsequent pages.

One means of structuring a memo or report to a colleague is as follows:

[Letterhead, with your contact information clearly stated]

[Date]

To: [Colleague's name and, if appropriate, title]

From: [Your name and, if appropriate, title]

Re: [One line that summarizes the purpose of the memo or report]

First paragraph: Summarize what your colleague has asked of you, and provide a brief answer.

Next: Summarize any important information your colleague has given you that affects your analysis, such as the facts of the case or any particular concerns your colleague has expressed. You may also ask your colleague to confirm matters of which you are uncertain, or you may indicate that you require further information.

Next: Identify the relevant legal principles, including whether any of them are in conflict. Your colleague should have a firm grounding of what should be guiding the analysis and all decision making (i.e., the need to preserve autonomy; the need to achieve health equity; etc.)

Next: Provide your analysis, leading your colleague from the question to the answer. Give your colleague sufficient information such that your colleague will be able to test your analysis and

determine whether he or she agrees with your conclusion or recommendation. Provide citations for case law and statutory law, and, if appropriate, attach relevant excerpts as an appendix.

Next: If more than one course of action could be taken, identify the options and the advantages and disadvantages of each. Recommend the course of action you believe to be in the best interests of your colleague's client and the reasons for your belief.

Next: Identify what steps need to be taken to implement your recommendation.

[Appropriate salutation, such as "I would be pleased to provide any further assistance you require."]

[Your name]

Policy brief:

A policy brief requires you to think of law in a greater context. This can be very difficult, as lawyers tend to develop tunnel vision. They lose sight of law's impact on the real world.

A policy brief is generally prepared for a senior executive in government or a quasi-governmental body, in a non-profit organization or in some larger corporations that have broader mandates. As with the client memo discussed earlier in this Manual, the reader is often not legally trained and does not care about the intricacies of the law.

Typically, policy briefs are heavily structured. Each organization tends to have strict requirements about format and page lengths. It would be rare for a policy brief to exceed 5 pages; more usually, they are required to be about 3 to 4 pages.

One means of structuring a policy brief is as follows:

[Letterhead, with your contact information clearly stated]

[Date]

To: [Name and title of the person for whom the policy brief is prepared (note: this may not be the person who requested it)]

From: [Your name and position within the organization]

Re: [One line that summarizes the subject matter of the brief]

First paragraph: Summarize the issue and the policy option you recommend.

Next: Summarize relevant background information, giving facts and not argument. Your summary should include the following:

- Outline the nature of the issue –
 - describe the problem, when it arose and what its symptoms and effects are,
 - describe who is affected by the issue and how ("stakeholders"), and
 - indicate whether the issue relates to other issues the organization is dealing with;
- Explain the law that applies to the issue;

- Note any ethical problems the issue presents, and how the issue fits within or conflicts with the organization's policy objectives (a policy objective would be, e.g., getting approval for a new treatment; providing better palliative care; increasing numbers of health care providers; etc.);
- Indicate whether there are any deadlines or other matters that affect the policy process.

Next: Discuss the issue, again providing facts and not argument. Your discussion should include a summary of

- the results of any research, studies, reports or legal opinions,
- any relevant judicial considerations of the issue,
- stakeholder perceptions and concerns, including the results of any consultations, and
- what other jurisdictions are doing in respect of the issue.

Next: Identify and analyze the options to be considered. Unless you have been given specific options to consider, strive to be innovative. Generally, you should provide the 3 best options for addressing the issue. Your analysis should

- identify the advantages and disadvantages of each option in light of your discussion above, and
- consider the legal, economic, social, political, ethical and practical implications of each option.

Next: Recommend the option you believe most closely aligns with your organization's objectives and capabilities.

Next: Describe the steps that must be taken to implement that option. If implementing the recommended option requires a legislative instrument (such as an order, a bylaw, a statutory plan, a regulation or a legislative amendment), provide the framework for the drafting of the instrument. This includes the following information:

- Who is subject to the provision?
- What is it that the subject may, must or must not do (i.e., what are the powers and duties of the subject)?
- Is there a place or time component (i.e., does it apply only to a limited area, or only for a set period)?
- Is there a procedural component, and if so, what is it (i.e., does an application need to be made, or is there an appeal process)?
- Are there limits or conditions that apply (i.e., a health officer may issue a licence only if the applicant meets certain qualifications)?
- Are there sanctions (fines, administrative penalties, something else) for non-compliance?
- Are there exceptions (i.e., the minister may waive the requirement in certain circumstances)?

Research papers:

As most of you have completed several research papers by this point in your academic career, you likely have a fair idea of how to approach one. The following notes may be of use to you, however:

- Choose a topic that is relevant to a real-life matter. While there is value in papers that are exploratory or historical in nature, the best papers are those that address a matter that is current.

Concern yourself with real problems faced by real people

- Ground your paper firmly in legal principles. There is a tendency on the part of lawyers to pull out precedent after precedent and parrot them off as divine law. Precedents should be used as examples only. If you argue on principle and the precedents support you, that's nice. If you argue on principle and the precedents do not support you, judges will often find a way to distinguish the precedents so as to be consistent with the principles.

Argue principle; not precedent

- Law is only one small part of the universe. It may be understood only in the context of the larger policy issues that affect it, and that it affects in turn. Strive to identify and consider that context.

Do not look at law as if it exists in a vacuum

- In your analysis of the problem, focus your use of supporting material. There may be dozens and dozens of reports, studies, judicial considerations, etc., that are relevant, but you should refer to only those that are the most recent, that come from the highest authority, and that provide the most thorough and reliable information or review.

Be a sniper; not a machine gunner

- Identify any weaknesses in your own analysis. Not only is this academically honest, it makes your analysis stronger. It demonstrates that you know that there are matters that require further consideration or that are subject to argument.

Embrace the colour of our profession: grey

- Propose a viable solution to the problem you have presented, and give details as to how that solution may be implemented.

Use law as a tool to solve problems