

UNIVERSITY OF TORONTO  
DEPARTMENT OF POLITICAL SCIENCE

POL 337Y (2015-2016)

**THE CANADIAN CONSTITUTION**

PROFESSOR RAN HIRSCHL (FALL TERM)

Class: Monday, 12-2 p.m., UC 161

Office Hours: Monday, 2-3:15 p.m., SSH Room 3125

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The course offers a comprehensive examination of philosophical and political issues relating to Canada's constitution. Among the issues the course examines are: the moral foundations, historical events, political forces and legal ideals that have shaped the constitution; the fundamentals of federalism and the separation of powers in Canada; the roots and legacies of the *Constitution Act 1867*, and the *Constitution Act 1982*; the politics of constitutional reform; judicial interpretation of the constitution in general, and the *Charter of Rights and Freedoms* in particular; "differentiated citizenship" and the Canadian constitution; the socio-political impact of the constitutionalization of rights and constitutional litigation; and the judicialization of politics in present-day Canada.

The course will be divided into four major segments. The introductory part will survey the major functions and components of constitutions, what is constitutional law, the sources and characteristics of the Canadian constitution, as well as basic tensions embedded in the very notion of a "constitutional democracy." The course's second part will focus on fundamental aspects of Canadian constitutionalism, such as the federal/provincial division of powers and jurisdictions; the court system and the Supreme Court of Canada; constitutional change and the attempts to resolve socio-political tensions in Canada through "mega" constitutional reform; Aboriginal peoples and the Canadian constitution. The course's third segment will examine the political theory and constitutional jurisprudence related to the *Charter of Rights and Freedoms*. Among the issues to be examined are: the legacy of the pre-Charter era, the Charter's operational provisions, freedom of expression, religion and association, language rights, the right to "life, liberty, and security," due process rights, and equality rights. The course's fourth part will examine the "extra-judicial" impact of the Charter on patterns of social change and political discourse, as well as questions such as whether the Charter-based judicial review is legitimate, and how much power and influence do Supreme Court judges enjoy in the wake of the Charter. Throughout the course, the Canadian constitution will be examined from a comparative perspective, emphasizing Canada's unique constitutional legacy while also attempting to put the series of dramatic constitutional events which have taken place in Canada over the last few decades in a broader context of similar developments which have taken place in other polities.

Prerequisites: the course's prerequisites are: POL 103Y, POL 214Y or POL224Y. Decent knowledge of Canadian government institutions, their prerogatives and modes of operation is assumed.

Evaluation: students will be evaluated on the basis of the following requirements:

Fall Term 50% (Prof. Ran Hirschl):

- *Attendance (5%):* Class attendance is essential. You are expected to be prepared for class. Class meetings will be organized around an introductory lecture followed by a guided discussion of a given week's topic(s). Note that course lectures and the reading materials complement (rather than substitute for) each other.
- *Memorandum (20%):* A 1,500-word all inclusive research brief due in class on **Monday, November 16, 2015**. Detailed guidelines will be distributed in class by the instructor. A late penalty of 5% per day including Saturdays and Sundays applies to this assignment. Papers not submitted in person to the instructor must be submitted by Monday, November 16, 2015 at 2 p.m. to the Department of Political Science reception desk (open between 9 a.m. and 4:30 p.m. on weekdays only). The instructor assumes no responsibility for papers otherwise submitted. No fax or e-mail submissions will be accepted. Students are strongly advised to retain a hard-copy of their submitted paper.
- *First term test (25%):* An in-class 2-hour test to be held on **Wednesday, December 9, 2015**.

Winter Term 50% (Dr. Vuk Radmilovic):

- *Attendance (5%):* Class attendance is essential. You are expected to be prepared for class. Class meetings will be organized around an introductory lecture, and students will have an opportunity to engage in discussions of a given week's topic(s). Note that course lectures and the reading materials complement (rather than substitute for) each other.
- *Term paper (20%):* Each student will be required to write a 2,000-word research paper due in class on **Monday, March 21, 2016**. Students will be provided guidelines on how to write the assignment early into the semester. A late penalty of 5% per day including Saturdays and Sundays will apply.
- *Second term test (25%):* An in-class 2-hour test will be held on **Monday, April 4, 2016**.

Readings: readings will centre around the following required texts:

- Patrick Monahan and Byron Shaw, *Constitutional Law* (4<sup>th</sup> edition; Irwin Law, 2013) [CL], ISBN 978-1-55221-303-2; available for purchase at the *University of Toronto Bookstore*. Two copies are held on reserve at Robarts Library's Short-Term Loan section. Each chapter of CL concludes with a list of further recommended readings. Mastery of these additional readings may be helpful but is not required.
- Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (5<sup>th</sup> edition; Irwin Law, 2013) [CRF], ISBN 978-1-55221-341-4; available for purchase at the *University of Toronto Bookstore*. Two copies are held on reserve at Robarts Library's Short-Term Loan section. Each chapter of CRF concludes with a list of further recommended readings. Mastery of these additional readings may be helpful but is not required.
- The full text of the *Constitution Act, 1867* and the *Constitution Act, 1982* are reprinted in CL, from page 539 onward. The full text of the Charter of Rights and Freedoms also appears in CRF, pp. 447-455.
- The complete collection of the Supreme Court of Canada judgments by name/year as well as useful statistics and other information on the Court is available at: <http://www.scc-csc.gc.ca/home-accueil/index-eng.aspx>
- Other required reading materials will be available online, distributed in class, or posted on the course Blackboard (marked [B]).

### **Academic Integrity:**

Plagiarism is a serious academic offence and will be dealt with accordingly. Important information on “How Not to Plagiarize,” on proper forms of documentation and on proper methods of citation and integrating sources may be found here:

Writing at the University of Toronto; <http://www.writing.utoronto.ca/advice/using-sources>

Students are strongly advised to keep draft work as well as hard copies of their essays and assignments before handing them in to the Instructor/Department. These should be kept until the marked assignments have been returned and the grades posted on ROSI.

### **Accessibility:**

The University of Toronto is committed to accessibility. If you require accommodation for a disability or have any accessibility concerns about the course, the classroom or course materials, please contact Accessibility Services as soon as possible:

[disability.services@utoronto.ca](mailto:disability.services@utoronto.ca); or <http://studentlife.utoronto.ca/accessibility>.

## FALL TERM

### I. INTRODUCTION

#### The Basic Vocabulary (Sept. 14; Sept. 21)

Objectives and design of the course  
Course expectations, materials & requirements  
What is a constitution?  
What is constitutional law, and what it is not?  
What is judicial review?  
Approaches to constitutional interpretation  
Sources, characteristics, principles and components of Canada's constitution  
Canadian constitutionalism in comparative perspective

CL: Ch. 1 (pp. 3-23)

### II. CONSTITUTIONAL DEVELOPMENT

#### Early Constitutional Development: Pre-Confederation to the 1950s (Sept. 28)

CL: Ch. 2, Ch. 3 (pp. 72-74)

*Pre-confederation documents* – available online via William F. Maton's collection at:  
<http://www.solon.org/Constitutions/Canada/English/PreConfederation/index.html>

Additional recommended readings:

Christopher Moore, *1867: How the Fathers Made a Deal* (McClelland & Stewart, 1997)

Peter H. Russell, *Constitutional Odyssey* (3<sup>rd</sup> ed., University of Toronto Press, 2004), pp. 12-33.

#### The Constitution Act 1867, Federalism and Division of Powers (Oct. 5; Oct. 19)

CL: Ch. 3 (student self-study), Ch. 4 (parts A, B, C), Chs. 7-9

Additional recommended readings:

Samuel LaSelva, *The Moral Foundations of Canadian Federalism*, (McGill-Queen's University Press, 1996).

Herman Bakvis et al., *Contested Federalism* (Oxford University Press, 2009).

**The Judiciary: The Court System, the Supreme Court, Judicial Independence** (Oct. 26)

*CL:* Ch. 4 (part D)

*Reference re Supreme Court Act, ss. 5-6, 2014 SCC 21 (March 21, 2014) [B]*

Ben Alarie and Andrew Green, "Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada," *University of New Brunswick Law Journal* 58 (2008): 73-91. **[B]**

Additional recommended readings:

Nadia Verrelli, ed., *The Democratic Dilemma: Reforming Canada's Supreme Court* (McGill-Queens University Press, 2013).

Donald Songer et al, *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (McGill-Queen's University Press, 2012).

Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (UBC Press, 2013).

Donald Songer, *The Transformation of the Supreme Court of Canada: An Empirical Analysis* (University of Toronto Press, 2009).

**Constitutional Change since the 1960s** (Nov. 2; Nov. 16; Nov. 23)

*CL:* Ch. 5 (part C & D); Ch. 6

*Reference re Senate Reform, 2014 SCC 32 (April 25, 2014) [B]*

Additional recommended readings:

Peter H. Russell, *Constitutional Odyssey* (3<sup>rd</sup> ed., University of Toronto Press, 2004).

Stephen Clarkson and Stepan Wood, *Perilous Imbalance: The Globalization of Canadian Law and Governance* (UBC Press, 2009).

Vuk Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec Secession Reference and Beyond," *Canadian Journal of Political Science* 43 (2010): 843-869.

**Aboriginal Peoples & the Canadian Constitution** (Nov. 30; Dec. 7)

*CL:* Ch. 14

*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (decision released June 26, 2014) [B]

Additional Recommended Readings:

John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010).

Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*, (University of Toronto Press, 2014).

Prime Minister Stephen Harper's statement of apology to former students of Indian residential schools (June 11, 2008).

*Nisga'a Agreement*

**In-class Term Test (UC 161, Wednesday, December 9, 2015, 12-2 p.m.)**

**UNIVERSITY OF TORONTO**  
**DEPARTMENT OF POLITICAL SCIENCE – WINTER 2016**  
**POL 337 – The Canadian Constitution**

Place: UC161

Time: Monday 12-2

Office Hour: Monday 2-3, SSH 3058

## **I. Introduction**

The purpose of this half of the course is to explore the impact of the Canadian Charter of Rights and Freedoms on Canadian politics and legal culture. The first section of the semester will introduce the Charter's history and its substantive content. Topics will include the legacy of the pre-Charter era in Canada, the meaning of constitutionally entrenched rights, and a review of the jurisprudence surrounding the major provisions of the Charter. Of particular interest will be freedom of expression, religion, association, equality, language rights, "life liberty and security of the person," due process rights and how each of these rights and freedoms can be constitutionally limited. In the latter half of the class the conversation will shift to a discussion of the role the Charter has had in changing Canadian society.

## **II. Contact Policy and Office Hours**

I am available at my email address of [andrew.mcdougall@utoronto.ca](mailto:andrew.mcdougall@utoronto.ca). My office hours will be held on Mondays between the hours of 2 p.m. and 3 p.m. in room SSH3058 of Sydney Smith Hall.

In the event of an emergency I am also reachable through my cell at 416-432-3813. I am also available to meet by appointment if necessary.

## **III. Assignments**

The assignments are provided for in the first term syllabus. To review:

1. **Attendance (5%).** Attendance at lectures is essential for doing well in this class. There will be five random classes where attendance will be taken. Failure to sign in for attendance at one of those classes will not be excused absent adequate documentation provided for in the Calendar.
2. **Second Term Essay (2000 words, 20%). DUE: MONDAY, MARCH 21 2016.** This assignment will ask you research a particular aspect of the Charter's development or its relation with Canadian society. A list of approved essay topics will be handed out in the

coming weeks. The papers should be double spaced in Times New Roman font, with one inch margins. The papers should have a coversheet and page numbers beginning on the first page of writing (i.e. the cover does not count.) All citations should be in the Chicago “author-date” parenthesis style (NOTE: PAGE NUMBERS ARE REQUIRED IN THE REFERENCES!) For the research paper the use of materials from the course reading list is permissible but significant research will be required beyond the syllabus to get a good grade. If you are unable to submit a piece of work in a timely manner, you are required to submit adequate medical documentation or otherwise seek an extension at the earliest time possible. Failure to hand in either of the written assignments will result in a 5% daily penalty, including weekends.

3. **Second Term Test (25%) DUE: MONDAY, APRIL 4, 2016.** This test will be held in class and will ask you to answer three essays of equal weight. You will have to choose one question out of three in three different sections.

## **IV. Plagiarism**

Plagiarism is a serious academic offense. Students at this level should already have a thorough understanding of what is meant by the term “plagiarism” and the meaning of “academic integrity” more generally.

Students should review the University’s policies and resources on the matter which can be found on its website, and in particular the sheet “How Not to Plagiarize” located at <http://www.writing.utoronto.ca/advice/using-sources/how-not-to-plagiarize>.

## **V. Accessibility**

Classes at the University of Toronto are meant to be welcoming environments for students of all abilities. Should you require assistance, please contact the University of Toronto’s Accessibility Services at <http://www.accessibility.utoronto.ca/>.

## **VI. Readings**

Most of the readings in this class can be found in the course textbook available at the bookstore, *The Canadian Charter of Rights and Freedoms*, 5<sup>th</sup> ed, by Robert J. Sharpe and Kent Roach. Other readings will be posted on blackboard or will be available through the library.

## **VII. Class Schedule**

### **I. CONSTITUTIONAL DEVELOPMENT**

#### **JANUARY 11, 2016 – The Definition and Theoretical Justification of Rights**

What are rights? How did the Charter change the rights dialogue in Canada? How were rights protected in a pre-Charter era?

CRF pp. 4-19

Alon Harel. “Theories of Rights.” In M. Golding and W. Edmundson (eds.) *Philosophy of Law and Legal Theory*. (Blackwell, 2005). pp. 191-206. BLACKBOARD.

Additional suggested readings

Christopher MacLennan. *Toward the Charter: Canadians and the Demand for a National Bill of Rights 1929-1960*. (Montreal: McGill- Queen’s, 2005).

**JANUARY 18, 2016 – Operation of the Charter and Limits on Rights I**

Sections 1 and 33 make clear that rights are not always “trumps.” Under what conditions can a right be curtailed?

CRF: Chs. 3-6

Gardbaum, Stephen. “Reassessing the New Commonwealth Model of Constitutionalism.” *International Journal of Constitutional Law*. 8(2010). pp. 167-206. BLACKBOARD.

**JANUARY 25, 2016 –Operational of the Charter and Limits on Rights II**

CRF: Chs. 3-6

**FEBRUARY 1, 2016 – Freedom of Speech**

It has been said that freedom of speech is the right from which all others flow. But what counts as “speech,” and what types of entities are constitutionally protected? Furthermore, how have the courts looked at “hate speech” and should it be protected?

CRF: Ch. 9

**FEBRUARY 8, 2016 – Freedom of Religion**

This class will examine freedom of religion and belief in Canada. Special attention will be paid to the recent debate in Quebec over “reasonable accommodations” and its proposed “Charter of Values.”

CRF: Ch. 8

Hirsch and Shachar. “The Constitutional Boundaries of Religious Accommodation” in *Constitutional Secularism in an Age of Religious Revival*. Michel Rosenfeld and Susanna Mancini (eds). (Oxford: OUP: 2014). pp. 175-191. Available at:

<http://www.oxfordscholarship.com.myaccess.library.utoronto.ca/view/10.1093/acprof:oso/9780199660384.001.0001/acprof-9780199660384-chapter-10>

## **FEBRUARY 26, 2016 – Section 7: Life, Liberty, Security of the Person, and Fundamental Justice**

The American constitution guarantees “life, liberty and the pursuit of happiness.” In Canada, it guarantees “security of the person” in accordance with “fundamental justice.” What do these terms mean?

CRF: Ch.13

## **FEBRUARY 29, 2016 \*\*NOTE DIFFERENT DATE\*\*– Section 15: Equality**

Not all claims to equality are equal. What does “equality” mean under the Charter? Why have different groups achieved different levels of success when pursuing claims?

CRF: Ch. 15

## **MARCH 7, 2016– Language rights/Democratic rights**

Language rights represent one of the largest sections of the Canadian Charter of Rights and Freedoms. What do they provide for and how have they evolved? What does this say about Canadian politics?

Secondly, the class will review some of the rights that citizens hold that make democracy possible.

CRF: Ch. 11; CRF: Ch. 16

## **II. DEBATES SURROUNDING THE CHARTER REVOLUTION**

### **MARCH 14, 2016 – Charter and Society I**

This class aims to ask whether or not judges have become too powerful in Canada. Is judicial review “legitimate” in a democracy? The class will also review the “dialogue” theory of rights jurisprudence, and take stock of some political developments that have come about as a result of judicial interpretation of the Charter.

CRF: Ch. 2

Hogg, Peter, Alison A. Bushell Thornton and Wade K Wright. “Symposium: Charter Dialogue Revisited” *Osgoode Hall Law Journal*. (Spring 2007). 45(1). 1-65.  
BLACKBOARD.

### **MARCH 21, 2016 – Charter and Society II [ESSAYS DUE]**

In this class we return to a more general discussion about rights. Is rights litigation an effective path for social change?

Whyte, John D. "The Charter at 30: A Reflection." *Review of Constitutional Studies*. (2012) 17(1). 1-13. BLACKBOARD.

Epp, Charles. "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms." *American Political Science Review*. 90(1996): 765-779. BLACKBOARD.

Rosenberg, Gerald. "Substituting Symbol for Substance: What did *Brown* Really Accomplish?" *PS: Political Science and Politics* 37(2004):205-9. BLACKBOARD.

Glendon, Mary-Ann. *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), pp. 1-17. BLACKBOARD.

## **MARCH 28, 2016 - REVIEW**

## **APRIL 4, 2016 – IN-CLASS TEST**