

**UNIVERSITY OF TORONTO****DEPARTMENT OF POLITICAL SCIENCE – FALL/WINTER 2016-17****POL 337 – The Canadian Constitution**

Instructor: Andrew McDougall

Place: UC163

Time: Tuesday 6-8

Office Hour: TBA

**I. Introduction**

This course will introduce students to the major concepts that underlie the Canadian constitution.

In the first semester, the course will focus on the constitutional history of Canada, and in particular the major sections of the *Constitution Act, 1867*. Of particular importance will be documents of the pre-Confederation era, the concept and development of Canadian federalism, Aboriginal rights, and the process of constitutional patriation. The major characteristics and interrelationship between the executive, legislative, and judicial branches of government will also be examined in detail.

The second half is dedicated to the Charter. 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 by appointment.

**Assignments**

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

1. **Attendance (10%).** Attendance at lectures is essential for doing well in this class. There will be ten 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. **First Term Essay (1500 Words, 20%). DUE: NOVEMBER 1, 2016.** The first term essay will ask you to write a 1500-word memo from a list of approved topics. The memo will be due in class and on tunitin. 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!) 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. **First Term Test 25% DECEMBER 6, 2016.** This will be a two hour in-class test covering the first term material.
4. **Second Term Essay (2000 words, 20%). DUE: TUESDAY, MARCH 21 2017.** 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, although you are free to write on another topic so long as you get permission first. 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.
5. **Second Term Test (25%) DUE: MONDAY, APRIL 4, 2017.** This test will be held in class and while it can cover any topic from the year it will focus on the second term material.

### III. 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>.

#### **IV. 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/>.

#### **V. Readings**

Most of the readings in this class can be found in the course textbooks available at the bookstore, *Constitutional Law*, 4<sup>th</sup> ed. by Monahan and Shaw for the first term and *The Canadian Charter of Rights and Freedoms*, 5<sup>th</sup> ed, by Robert J. Sharpe and Kent Roach for the second term. Other readings will be posted on blackboard or will be available through the library.

#### **VII. Class Schedule**

##### **I. INTRODUCTION**

##### **SEPTEMBER 12, 2016 – Introduction and Concepts**

This class will introduce the major ideas behind constitutions that will be needed for this class. What is "constitutional law?" What is the "common law?" "What is a "constitutional convention?"

##### **SEPTEMBER 20, 2016 – Constitutional History**

The preamble to the *Constitution Act, 1867* says that we have a constitution "similar in principle to the United Kingdom," but there were a large number of instruments that predate Confederation. This class will examine Canada's constitutional evolution up to 1867, including the Royal Proclamation of 1763, the Durham Report, the adoption and meaning of responsible government, and other ideas.

CL 3-23, Chapter 2.

Andrew Heard, *Canadian Constitutional Conventions*, Oxford, 2016. Chapter 1. Blackboard.

##### **II. CONSTITUTIONAL DEVELOPMENT AND COMPONENTS**

##### **SEPTEMBER 27, 2016 – The Executive & Legislative Branch**

While the Americans vest the sovereignty of the state in the people, in our system, it is in the hands of the "Crown-in Parliament." What is the Crown in Canada? What is the role of the

Governor General and the provincial counterparts? And how does the executive relate to the legislative branch?

CL Ch. 3.

### **OCTOBER 4, 2016 - The Judiciary**

This class will look at the judiciary and judicial independence in Canada. What is the proper role of the courts in Canada? How did this change after 1982? What are the implications?

CL 138-161

*Reference Re the Remuneration of Judges of the Provincial Court of PEI.* Headnote + paras 82-109 (Available online)

*Reference re the Supreme Court Act (Nadon Reference)* (Available online)

### **OCTOBER 11, 2016– Federalism**

This case will look at the evolution of the division of powers over time. Did the JCPC get section 91 and 92 “Wrong?” What is the difference between federalism and “multilevel governance?” How are provinces and territories different? How are cities different? And what is the spending power?

Alain Cairns. 1971. “The Judicial Committee and its Critics” *CJPS* 1971 pg. 301-45.

BLACKBOARD.

CL Chs. 7 and 8

### **OCTOBER 18, 2016 – Division of Powers I**

This will touch on some substantive fields. This week: Trade and Commerce in s. 91(2) & Property and Civil Rights in s. 92(13).

CL Chs. 9-10

### **OCTOBER 25, 2016 – Division of Powers II**

This class will look at the Criminal Law power (91(27)), Transportation, & the Treaty Power (s.132).

CL Chs. 11-12

### **NOVEMBER 1 – Aboriginal Peoples \*\*First Term Essay Due in Class\*\***

This class will look at the meaning of Aboriginal rights and their different bases in Canada.

CL Ch.14

**NOVEMBER 8, 2016 - Break – No Class**

**NOVEMBER 15, 2016 – Patriation, the Amending Formula, and the move towards the Charter.**

This Class will review the patriation process in Canada. It will also address the amending formula, which has been one of the biggest obstacles to constitutional change in Canada. How has this been resolved?

CL Ch. 5

**NOVEMBER 22, 2016 – Constitutional change since 1982 –The Meech Lake Accord, Charlottetown Accord, the Secession Reference.**

This class will look at constitutional evolution and efforts at reform since 1982, including the Meech Lake Accord, the Charlottetown Accord, and the *Secession Reference*.

CL Ch. 6.

*Reference Re Secession of Quebec*. (Available online).

**NOVEMBER 29, 2016 - Review**

**DECEMBER 6, 2016 – IN CLASS TEST**

**\*\*SECOND TERM\*\***

### **III. CHARTER RIGHTS**

**JANUARY 10, 2017 – 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.

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

**JANUARY 17, 2017 – Operation of the Charter and Limits on Rights I – Section 1**

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 24, 2017 –Operational of the Charter and Limits on Rights II – Section 33**

CRF: Chs. 3-6

### **JANUARY 31, 2017 – 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 7, 2017 – 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

Hirschl 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. BLACKBOARD.

### **FEBRUARY 14, 2017 – 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 21, 2017 \*\*NO CLASS READING WEEK\*\***

### **FEBRUARY 28, 2016 -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, 2017– 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

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

### **MARCH 14, 2017 – 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

“Symposium: Charter Dialogue Revisited” *Osgoode Hall Law Journal*. (Spring 2007). 45(1). 1-65.

### **MARCH 21, 2017 – Charter and Society II - \*\*Essays Due in Class\*\***

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. [**U of T Library Online Resources**].

Rosenberg, Gerald. “Substituting Symbol for Substance: What did *Brown* Really Accomplish?” *PS: Political Science and Politics* 37(2004):205-9. [**U of T Library Online Resources**].

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

**MARCH 28, 2017 - Review**

**APRIL 4, 2017 – IN-CLASS TEST**