

UNIVERSITY OF TORONTO
DEPARTMENT OF POLITICAL SCIENCE

POL 337Y (2010-2011)

THE CANADIAN CONSTITUTION

PROFESSOR RAN HIRSCHL

Class: Tuesday, 12-2 p.m., BL 205
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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, 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, the right to "life, liberty, and security," due process rights, equality rights, language and education rights. The course's fourth part will examine "extra-judicial" impact of the Charter revolution on patterns of social change and political discourse. 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 past decades in a broader context of similar developments which have taken place in other polities.

Prerequisites: the course's prerequisites are: POL 103Y or POL 214Y. 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:

- *Attendance (10%)*: 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 material complement (rather than substitute for) each other.
- *First term test (25%)*: An in-class 2-hour test to be held on Tuesday, December 7, 2010.
- *Second term essay (25%)*: A 2,500-word research note/policy paper due in class on Tuesday, February 15, 2011. Guidelines and a list of topics will be distributed by the instructor in early January. To conserve paper, please make an effort to print your essay double-sided (learn how at: printdoublesided.sa.utoronto.ca). A late penalty of 3% per day including Saturdays and Sundays applies to the second term essay assignment. Papers not submitted in person to the instructor must be submitted by February 15, 2011 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. A word to the wise: plagiarism is considered serious academic offense; disciplinary action will be taken against students who violate the Faculty of Arts & Science anti-plagiarism and/or academic conduct rules.
- *Final examination (40%)*

Readings: readings will centre around the following required texts:

- P. Russell, R. Knopff, T. Bateman, and J. Hiebert, *The Court and the Constitution: Leading Cases* (Emond Montgomery, 2008) [CC]; ISBN 978-1-55239-275-5; available for purchase at the *University of Toronto Bookstore*. Two copies are held on reserve at Robarts' Short-Term Loan section. Please note that CC has an accompanying password-protected website (www.emp.ca/SCCdecisions) with approximately two dozen additional annotated SCC decisions. The website is available for use by students enrolled in the course (username: student; password: the fifth word that appears in the editors' introduction to the case: *RJR-MacDonald Inc. v. Canada*, 1995).
- Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (4th edition; Irwin Law, 2009) [CH]; ISBN 978-1-55221-175-5; available for purchase at the *University of Toronto Bookstore*. Two copies are held on reserve at Robarts' Short-Term Loan section.
- Additional reading materials will be distributed in class and/or posted to the course Blackboard webpage.

The full text of the *Constitution Act, 1867* and the *Constitution Act, 1982* appears in CC, pp. 553-564. The full text of the *Charter of Rights and Freedoms* also appears in CH, pp. 415-423.

The complete collection of Supreme Court decisions (1983-2010) is available at: <http://csc.lexum.umontreal.ca/en/>. Useful information about the structure of government in Canada is available at: <http://canada.gc.ca/aboutgov-ausujetgouv/structure-eng.html>. Most topics/sub-headings include additional recommended readings for your information. As well, each chapter of *CH* includes a list of suggested readings. Mastery of these additional readings may be helpful but is not required.

FALL TERM

I. INTRODUCTION

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

Objectives and design of the course
Course materials & requirements
What is a constitution?
What is constitutional law?
What is judicial review?
Approaches to constitutional interpretation
Characteristics, principles, and components of Canada's constitution
Constitutionalism in Canada and abroad

II. CONSTITUTIONAL DEVELOPMENT

Constitutional Development up to 1867 (Sept. 28)

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

The Constitution Act (British North America Act) 1867 available in *CC* – pp. 553-558.

Additional recommended readings:

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

Peter H. Russell, *Constitutional Odyssey* (3rd ed., UTP, 2004), pp. 12-33.

The Division of Powers (Oct. 5; Oct. 12)

CC – pp. 33-74; 81-158

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. 19)

CC – pp. 1-30, 75-80

The Supreme Court website: <http://www.scc-csc.gc.ca/court-cour/index-eng.asp>

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.

Additional recommended readings:

F.L. Morton, “Judicial Appointments in Post-Charter Canada: A System in Transition,” in Kate Malleson and Peter Russell, eds. *Appointing Judges in an Age of Judicial Power* (UTP 2006), pp. 56-79.

Ian Greene, *The Courts* (UBC Press, 2006).

C.L. Ostberg and Matthew Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (UBC Press, 2007).

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

Lori Hausegger et al., *Canadian Courts: Law, Politics, and Process* (OUP, 2009).

The Quebec Question and Constitutional Change since the 1970s (Oct. 26; Nov. 2; Nov. 16)

CC – pp. 483-552

Additional recommended readings:

Peter H. Russell, *Constitutional Odyssey* (3rd ed., UTP, 2004).

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

Aboriginal Peoples & the Canadian Constitution (Nov. 23; Nov. 30)

CC – pp. 411-470

Additional Recommended Readings:

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

"People to People, Nation to Nation" – Highlights from the Report of the Royal Commission on Aboriginal Peoples (Ottawa: Ministry of Supplies and Services, 1996), pp. 23-57.

Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (UBC Press, 2000)

John Borrows, *Canada's Indigenous Constitution* (UTP, 2010)

Nisga'a Agreement

First Nations Governance Act (proposal)

In-class Term Test (Tuesday, December 7, 2010)

WINTER TERM

III. THE CHARTER OF RIGHTS AND FREEDOMS

What are Constitutional Rights? (Jan. 11)

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

Rights Jurisprudence in the Pre-Charter Era

(Self-study; topic will only be briefly covered in class)

CH – pp. 1-26

CC – pp. 161-180; 181-193

Additional recommended readings:

Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights 1929-1960* (McGill-Queens University Press, 2003).

"Charterland 101": The Charter's Operational Framework; The Supreme Court's General Interpretive Approach toward the Charter (Jan. 18; Jan. 25)

CH – pp. 47-64; 65-77; 90-96; 97-102; 109-111

CC – pp. 194-202; 203-212; 243-261

Freedom of Expression (Feb. 1)

CH – pp. 150-182

CC – pp. 275-326

Freedom of Religion (Feb. 8)

CH – pp. 129-149

CC – pp. 194-202

Additional recommended readings:

Bruker v. Marcovitz, [2007] 3 S.C.R. 607

Christopher L. Eisgruber and Mariah Zeisberg, “Religious Freedom in Canada and the United States” *International Journal of Constitutional Law* 4 (2006): 244-268.

Richard Moon, ed., *Law and Religious Pluralism in Canada* (UBC Press, 2008).

Language Rights; Democratic Rights (Feb. 15)

CH – pp. 194-210; 357-372

CC – pp. 262-274; 351-363

Additional recommended readings:

Will Kymlicka and Alan Patten, *Language Rights and Political Theory* (Oxford University Press, 2003).

Christopher Manfredi and Mark Rush, *Judging Democracy* (Broadview Press, 2008)

Right to Life, Liberty & Security (March 1)

CH – pp. 219-258

CC – pp. 219-242; 375-394

Fundamental Justice & Criminal Due Process Rights (March 8)

CH – pp. 259-306

Equality Rights (March 15)

CH – pp. 307-356

CC – pp. 327-336; 364-374

Additional recommended readings:

Fay Faraday et al. eds. *Making Equality Rights Real: Securing Substantive Equality Rights Under the Charter* (Irwin Law, 2006).

David A. Green, Jonathan Kesselman, eds., *Dimensions of Inequality in Canada* (UBC Press, 2007).

IV. DEBATES SURROUNDING THE CHARTER REVOLUTION

Is Judicial Review "Legitimate"? Are Judges Too Powerful? The "Dialogue" Metaphor (March 22)

CH – pp. 27-46

Additional recommended readings:

"Symposium: Are Judges Too Powerful?"

Articles in *Policy Options* (April 1999)

[Available on-line at <http://www.irpp.org/po/index.htm> (click 'back issues')].

Articles in *Policy Options* (October 2003)

[Available on-line at <http://www.irpp.org/po/index.htm> (click 'back issues')].

Lori Hausegger and Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada," *Canadian Journal of Political Science / Revue canadienne de science politique* 37 (2004): 23-50.

"Symposium: Charter Dialogue Revisited"

Osgoode Hall Law Journal 45:1 (Spring 2007)

Is Rights Litigation an Effective Path for Change? (March 29)

Miriam Smith, "The Impact of the Charter: Untangling the Effects of Institutional Change," *International Journal of Canadian Studies* 36 (2007): 17-40.

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

Gerald Rosenberg, "Substituting Symbol for Substance: What Did *Brown* Really Accomplish?" *PS: Political Science and Politics* 37 (2004): 205-209.

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

Additional recommended readings:

Charles Epp, *The Rights Revolution* (University of Chicago Press, 1998).

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edition, University of Chicago Press, 2008).

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

Florian Sauvageau et al., *The Last Word: Media Coverage and the Supreme Court of Canada* (UBC Press, 2005).

Summation and Reflections (April 5)