

**\*\* This is draft. Final version will be distributed on the first day of classes \*\***

UNIVERSITY OF TORONTO  
DEPARTMENT OF POLITICAL SCIENCE

POL 337Y1Y, 2013-14  
**THE CANADIAN CONSTITUTION**

INSTRUCTOR: VUK RADMILOVIC  
E-MAIL: vuk.radmilovic@utoronto.ca  
**OFFICE HOURS: Mondays 4PM-6PM, ROOM: TBD.**

#### **COURSE DESCRIPTION:**

This course investigates the Canadian constitution and a wide variety of issues related to it. Among the issues explored are: political, moral and historical foundations of the Canadian constitution; the nexus of written and unwritten rules that determine the constitution; the character and evolution of the division of powers between the federal and provincial governments; the role and function of judicial interpretation of the constitution; legislative-judicial relations and the judicialization of politics in contemporary Canada; constitutional litigation; and the scope and the effect of judicial power in the wake of the introduction of the Charter of Rights and Freedoms.

The course is divided into six major parts. The first part introduces students to some of the most important concepts in the study of contemporary constitutional law and politics. This part also introduces students to key theoretical approaches developed by legal and political scholars to help make sense of constitutionalism.

The second part of the course explores sources of the Canadian constitution. Specific attention in this part is given to tensions between written and unwritten components of the Canadian constitution which have attained increased relevance following the recent “crisis” of Parliamentary governance in Canada associated with the 2008 prorogation of the Canadian Parliament. The 2008 prorogation episode, and the surrounding debates, will be given particular attention.

The third part of the course explores the origins of the Constitution Act, 1867, the division of powers between the federal and provincial governments, and the relationship between Aboriginal peoples and the Canadian constitution.

The fourth part of the course is devoted to the issue of Senate Reform.

The Charter of Rights and Freedoms is at the heart of the fourth part of the course. This part explores the origins of the Charter, analyzes the basic operation of the Charter, discusses dominant interpretive approaches adopted by Supreme Court justices, and surveys Supreme Court’s jurisprudence in such areas as freedom of religion, freedom of association, rights to life, liberty and security of the person, and equality rights.

The final part of the course explores some of the most prominent public and academic debates that have emerged in the wake of the Charter, including whether Charter-based judicial review is legitimate, how much power do Supreme Court judges enjoy, and what is the extent to which the Charter has revolutionized and judicialized the Canadian body politic.

By the end of the course students will ...

- Have an understanding of how the Canadian constitution operates and what are its key components.
- Be able to identify key historical junctures in the Canadian constitutional history.
- Be exposed to the core theoretical approaches examining how judges should interpret constitutional documents, why do constitutional revolutions occur at particular historical moments, and how legal and political factors affect constitutional jurisprudence of courts in general and of the Canadian Supreme Court in particular.
- Develop an appreciation of the impact that the Charter of Rights and Freedoms has had on the Canadian democracy and body politic.

#### **EVALUATION / ASSIGNMENTS:**

Students will be evaluated on the basis of following requirements:

- *Attendance (10%).*  
Regular attendance is critical for achieving success in the class and ensuring an overall valuable experience in the course. Students are expected to be prepared for the class and to have completed their required readings before arriving to class. Class meetings will typically be organized around an introductory lecture. The students will also have an opportunity to engage in discussions of a given week's topic(s). Course lectures and reading materials are designed to complement one another, and regular attendance of classes is essential for a successful completion of the course.
- *Midterm (25%) – WILL BE HELD DECEMBER 3<sup>rd</sup>, IN CLASS.*  
Midterm will occur in-class. It will last two hours, and it will require students to provide a combination of short-answer and essay responses to a series of questions. Students will be provided guidance on how to prepare for the midterm during lectures.
- *Term Essay (30%) – DUE MARCH 10<sup>th</sup>, IN CLASS!*  
Each student will be required to write a 2,500-word research paper. Students will be provided guidelines on how to go about writing a research paper, including a list of topics, early into the semester. Papers are to be submitted to the instructor, in class, on the due date. A late penalty of 3% per day including Saturdays and Sundays will be applied to late submissions. Late papers are to be submitted to the Department of Political Science. Students may not submit their papers by e-mail.

- *Final Examination (35%)*

The format of the final examination will be similar to that of the Midterm. Students will be asked to provide short-answer and essay responses to a series of questions. A study guide will be provided during the final week of classes to help with the preparation.

**TEXTBOOKS:**

1. Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (4<sup>th</sup> edition; Irwin Law, 2009); ISBN 978-1-55221-175-5.
2. P. Russell, R. Knopff, T. Bateman, and J. Hiebert, *The Court and the Constitution: Leading Cases* (Edmond Montgomery, 2008).

***Students will be required to read a number of other articles beyond these two books. These materials will be available online, distributed in class, or posted on the course Blackboard page. The files will be available in PDF format.***

The complete collection of Supreme Court of Canada decisions (1948-2011) is available at: <http://scc.lexum.umontreal.ca/en/index.html>. This website provides other useful information, such as yearly statistical summaries of the Supreme Court's docket. Students are highly encouraged to explore the website. Also, most of the headings below include further recommended readings for your information. Familiarity with these readings may help you in ensuring success in the course but it is not required.

Also, appendices at the end of the course textbook contain a number of constitutional documents, including the Constitution Act, 1867 and the Constitution Act, 1982.

**WRITING SUPPORT:**

The college writing centres maintain some access in the summer, and students are advised to consult with them. One way to do so is by exploring this website: <http://www.writing.utoronto.ca/writing-centres/learning>.

Also, important information on “**How Not to Plagiarize,**” on proper forms of documentation, and on methods of integrating sources can be found here: [www.writing.utoronto.ca/advice/using-sources](http://www.writing.utoronto.ca/advice/using-sources).

Plagiarism is a serious academic offence and will be dealt with accordingly. For further clarification and information on plagiarism please see Writing at the University of Toronto <http://www.writing.utoronto.ca/advice/using-sources>.

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

*Normally, students will be required to submit their course essays to Turnitin.com for a review of textual similarity and detection of possible plagiarism. In doing so, students will allow their essays to be included as source documents in the Turnitin.com reference database, where they will be used solely for the purpose of detecting plagiarism. The terms that apply to the University's use of the Turnitin.com service are described on the Turnitin.com web site.*

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 or <http://studentlife.utoronto.ca/accessibility>.*

## **CLASS SCHEDULE:**

### **PART I. INTRODUCTION**

*September 9<sup>th</sup>*

WELCOME

Objectives and design of the course.  
Course materials and requirements.  
Basic expectations.

*Required Readings: None.*

*September 16<sup>th</sup>*

INTRODUCTION TO IMPORTANT CONCEPTS; THEORIZING CONSTITUTIONALISM AND JUDICIAL DECISION MAKING

*Required Readings:*

1. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, **pages 1-30 (Introduction)**.

### **PART II. SOURCES OF THE CANADIAN CONSTITUTION, CONSTITUTIONAL CONVENTIONS**

*September 23<sup>rd</sup>*

SOURCES OF THE CANADIAN CONSTITUTION

*Required Readings:*

1. Peter Hogg, *Constitutional Law of Canada*: pages 1-1 to 1-30. *AVAILABLE ONLINE*.

*September 30<sup>th</sup>*

RESPONSIBLE GOVERNMENT IN CANADA

*Required Readings:*

1. Peter Hogg, *Constitutional Law of Canada*: pages 9-1 to 9-40. *AVAILABLE ONLINE*.

*Additional/Recommended Readings:*

1. Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991).

October 7<sup>th</sup>

CRISIS OF PARLIAMENTARY GOVERNMENT?

2008 PROROGATION: ISSUES, DEBATES, IMPLICATIONS

*Required Readings:*

1. Tom Flanagan. (2009). "Only Voters Have the Right to Decide on the Coalition," *The Globe and Mail*, January 9, pg. A.13. AVAILABLE ONLINE.
2. Anonymous, (2009). "What happens next if PM loses vote on coming budget?" *Toronto Star*, January 23, pg. AA.6. AVAILABLE ONLINE.
3. *Adjusting to a New Era of Parliamentary Government*. Report of a Workshop on Constitutional Conventions. David Asper Centre for Constitutional Rights. Faculty of Law, University of Toronto. February 3-4, 2011. AVAILABLE ONLINE:  
<http://www.aspercentre.ca/Assets/Asper+Digital+Assets/Publications+and+Events/Constitutional+Conventions+Workshop/Final+Report/report-english.pdf>

*Additional/Recommended Readings:*

1. P.H. Russell and L. Sossin (eds.), *Parliamentary Democracy in Crisis* (University of Toronto Press, 2009).

**PART III. DIVISION OF POWERS AND ABORIGINAL PEOPLES**

October 14<sup>th</sup>

Thanksgiving Day. University Closed. **No Class!**

CONSTITUTION ACT, 1867: CONTEXT AND CONTENT

*Required Readings:*

1. Samuel LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements and Tragedies of Nationhood* (Montreal/Kingston: McGill-Queen's University Press, 1996), pages 31-48 (Chapter 2 only). AVAILABLE ONLINE.

*Additional/Recommended Readings:*

1. Pre-confederation documents – available online via William F. Maton's collection:  
<http://www.solon.org/Constitutions/Canada/English/PreConfederation/index.html>
2. Petter H. Russell. 2004. *Constitutional Odyssey* (3<sup>rd</sup> edition, UTP), pages 12-33.
3. Patrick Monahan, *Constitutional Law* (3<sup>rd</sup> edition; Irwin Law, 2006), Chapter 2.

October 21<sup>st</sup>

CONSTITUTION ACT, 1867: CONTEXT AND CONTENT

*Required Readings:*

1. Samuel LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements and Tragedies of Nationhood* (Montreal/Kingston: McGill-Queen's University Press, 1996), pages 31-48 (Chapter 2 only). AVAILABLE ONLINE.

*Additional/Recommended Readings:*

2. Pre-confederation documents – available online via William F. Maton’s collection: <http://www.solon.org/Constitutions/Canada/English/PreConfederation/index.html>
3. Petter H. Russell. 2004. *Constitutional Odyssey* (3<sup>rd</sup> edition, UTP), pages 12-33.
4. Patrick Monahan, *Constitutional Law* (3<sup>rd</sup> edition; Irwin Law, 2006), Chapter 2.

*October 28<sup>th</sup> and November 4<sup>th</sup>*

JUDICIAL REVIEW OF FEDERALISM

*Required Readings:*

1. Patrick Monahan, *Constitutional Law* (3<sup>rd</sup> edition; Irwin Law, 2006), **CHAPTER 7: The Courts and Canadian Federalism: From Watertight Compartments to Shared Responsibility, pages 231-252. AVAILABLE ONLINE.**
2. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, **pages 33-42 (Parsons and Russell); 46-51 (Local Prohibition); 81-106 (Johannesson, Chicken and Egg, Anti-Inflation Reference).**
3. *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837. AVAILABLE ONLINE.

*Additional/Recommended Readings:*

1. Cairns, Alan C. 1971. “The Judicial Committee and its Critics.” *Canadian Journal of Political Science* 4: 301-345.
2. Peter W. Hogg, 1979. “Is the Supreme Court of Canada Biased in Constitutional Cases?” *Canadian Bar Review* 57: 721-739.
3. Peter H. Russell, 1985. “The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources.” *Canadian Public Policy* 11: 161-170.
4. Bzdera, Andre. 1993. “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review.” *Canadian Journal of Political Science*, 26: 3-29.
5. Saywell, John. T. 2002. *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. Toronto: University of Toronto Press.
6. Baier, Gerald. 2006. *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada*. Vancouver: UBC Press.

*November 11<sup>th</sup>*

November Break. **No Classes!**

*November 18<sup>th</sup>: November Break; no class.*

ABORIGINAL PEOPLES AND THE CANADIAN CONSTITUTION I

*Required Readings:*

1. Peter Hogg, *Constitutional Law of Canada*, pages 28-1 to 28-9; 28-20 to 28-59. AVAILABLE ONLINE.

*Additional/Recommended Readings:*

1. *Royal Proclamation of 1763*.
2. Prime Minister Stephen Harper’s statement of apology to former students of Indian residential schools (June 11, 2008).

3. "People to People, Nation to Nation," Highlights from the Report of the Royal Commission on Aboriginal Peoples (Ottawa: Ministry of Supplies and Services, 1996): pages 23-57.
4. Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (UBC Press, 2000).
5. John Borrows, *Canadian Indigenous Constitution* (UTP, 2010).
6. *James Bay and Northern Quebec Agreement, 1975.*
7. *Nisga'a Agreement, 1999.*

November 25<sup>th</sup>

#### ABORIGINAL PEOPLES AND THE CANADIAN CONSTITUTION II

*Required Readings:*

1. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, **pages 411-470** (***Sparrow, Delgamuukw, Marshall 1, Marshall 2, Haida Nation***).

December 3<sup>rd</sup>

#### IN-CLASS MIDTERM TEST.

#### PART IV. CASE STUDY: SENATE REFORM

January 6<sup>th</sup> and January 13<sup>th</sup>

*Required Readings:*

1. Hogg – Chapter 9, Responsible Government. \*Revisit pages 9.17-9.20 only\*.
2. David E. Smith, "The Senate of Canada and the Conundrum of Reform," in *The Democratic Dilemma: Reforming the Canadian Senate*. McGill-Queen's University Press. pp. 11-26
3. Attorney General of Canada. Factum submitted to the Supreme Court of Canada in the Senate Reference Case. July 31<sup>st</sup>, 2013.

**\*\*Further readings to be assigned in November, 2013\*\***

#### PART V. CHARTER OF RIGHTS AND FREEDOMS

January 20<sup>th</sup>

#### CHARTER RIGHTS: HISTORY AND OPERATION

*Required Readings:*

1. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 1.
2. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 2.

January 27<sup>th</sup>

#### CHARTER RIGHTS: INTERPRETIVE APPROACHES

*Required Readings:*

1. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 3.
2. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, **pages 194-202** (***Big M Drug Mart***); **203-212** (***BC Motor Vehicle***); **243-261** (***Quebec v. Ford***).

*Additional/Recommended Readings:*

1. Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (4<sup>th</sup> edition; Irwin Law, 2009), pages 373-403.

*February 3<sup>rd</sup>*

LIMITATION AND OVERRIDE OF CHARTER RIGHTS

*Required Readings:*

1. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 4.
2. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 2.
3. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, **pages 194-202 (Big M Drug Mart); 213-218 (Oakes); 301-314 (Butler)**.

*February 10<sup>th</sup>*

REMEDIAL DISCRETION AND CHARTER DECISION MAKING

*Required Readings:*

1. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 17.

*Additional/Recommended Readings:*

1. Pinard, Danielle. "A Plea for Conceptual Consistency in Constitutional Remedies." 2006. 18. *National Journal of Constitutional Law*. 105-168.
2. Ryder, Bruce. 2003. "Suspending the Charter." *Supreme Court Law Review* 21: 267-285.

*February 17<sup>th</sup>*

Family Day. University Closed. **No classes!**

*February 24<sup>th</sup>*

FREEDOM OF RELIGION

*Required Readings:*

1. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 8.
2. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, **pages 194-202 (Big M Drug Mart)**.

*March 3<sup>rd</sup>*

LIFE, LIBERTY, SECURITY OF PERSON AND FUNDAMENTAL JUSTICE (SECTION 7 RIGHTS)

*Required Readings:*

1. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 13.
2. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, **pages 203-212 (BC Motor Vehicle); 219-242 (Morgentaler); 375-394 (Chaoulli)**.

*Additional/Recommended Readings:*

1. Cameron, Jamie. "From the MVR to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7," *Supreme Court Law Review* 34 (2006): 105-65.



March 10<sup>th</sup> – TERM ESSAY DUE IN CLASS!!

DEMOCRATIC RIGHTS

*Required Readings:*

1. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 11.
2. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, pages 351-363 (Sauvé).

March 17<sup>th</sup>

EQUALITY RIGHTS

*Required Readings:*

1. Sharpe and Roach, *The Charter of Rights and Freedoms*: Chapter 15.
2. Russell, Knopff, Bateman, Hiebert, *The Court and the Constitution*, pages 327-336 (Law v. Canada); 337-350 (M. v. H.); 364-374 (Ref re Same-Sex Marriage).

*Additional/Recommended Readings:*

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

## PART V. CHARTER POLITICS, DEBATES, IMPACT

March 24<sup>th</sup>

IS CHARTER-BASED JUDICIAL REVIEW LEGITIMATE?

*Required Readings:*

1. Hogg: 36-12 to 36-20.1.
2. Rainer Knopff, "Courts Don't Make Good Compromises." *Policy Options*, April 1999: 31-34.  
*AVAILABLE ONLINE:* [www.irpp.org/po/archive/apr99/knopff.pdf](http://www.irpp.org/po/archive/apr99/knopff.pdf)
3. Peter W. Hogg and Allison A. Thornton, "The Charter Dialogue Between Courts and Legislatures." *Policy Options*, April 1999: 19-22.  
*AVAILABLE ONLINE:* [www.irpp.org/po/archive/apr99/hogg.pdf](http://www.irpp.org/po/archive/apr99/hogg.pdf)
4. F.L. Morton, "Dialogue or Monologue," *Policy Options*, April 1999: 23-26.  
*AVAILABLE ONLINE:* [www.yorku.ca/khoosh/PPAS-S1-09/morton-Monologue.pdf](http://www.yorku.ca/khoosh/PPAS-S1-09/morton-Monologue.pdf)
5. 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.  
*AVAILABLE ONLINE THROUGH UofT LIBRARY.*

*Additional/Recommended Readings:*

1. Symposium: Charter Dialogue Revisited. *Osgoode Hall Law Journal* 45:1 (Spring 2007).
2. Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council," *Canadian Journal of Political Science* 35(2002): 3-29.

3. Rainer Knopff and F.L. Morton, "Ghosts and Straw Men: A Comment on Miriam Smith's 'Ghosts of the Judicial Committee of the Privy Council,'" *Canadian Journal of Political Science* 35(2002): 31-42.
4. Manfredi, Christopher P. 2001. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. 2nd ed. Don Mills, Ont.: Oxford University Press.
5. Morton, F.L. and Rainer Knopff. 2000. *The Charter Revolution & The Court Party*. Peterborough, Ont.: Broadview Press.

March 31<sup>st</sup>

#### CAN RIGHTS LITIGATION BRING ABOUT SOCIAL AND POLITICAL CHANGE

##### *Required Readings:*

1. Miriam Smith, "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada," *Politics & Society* 33: 2 (2005): 327-353.  
*AVAILABLE ONLINE.*
2. Charles Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms," *American Political Science Review* 90 (1996): 765-779.  
*AVAILABLE ONLINE.*
3. Gerald Rosenberg, "Substituting Symbol for Substance: What did *Brown* Really Accomplish?" *PS: Political Science and Politics* 37 (2004): 205-209.  
*AVAILABLE ONLINE.*

##### *Additional/Recommended Readings:*

1. Charles Epp, *The Rights Revolution* (University of Chicago Press, 1998).
2. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2<sup>nd</sup> edition, University of Chicago Press, 2008).
3. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).
4. Russell, Peter H. 1988. "Canada's Charter: A Political Report." *Public Law* 3(2): 385-410.
5. Mary-Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).