

**Law 359: Civil Liberties and the Charter  
Winter 2011**

**University of Victoria, Faculty of Law  
Professor Janna Promislow**

**CONTACT INFORMATION:**

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Location: Room 204

Times: Tuesday & Thursday, 3:30pm–4:50pm

Unit Value: 1.5 units

**COURSE DESCRIPTION AND OBJECTIVES:**

This course is an upper-year seminar on constitutional rights and liberties. The course will highlight the persistent critiques of the *Charter* and consider the relationship of rights-based arguments to progressive politics and social justice concerns. Our case studies will focus on particular areas, including social and economic rights, labour and protest, and rights and culture/competing rights claims. Historical and comparative perspectives will also be brought into the discussions from time to time.

This course will provide opportunities to expand your theoretical and doctrinal understanding of the *Charter*, as well as to develop your skills in critical analysis, research, and writing. Students will:

- Identify and explore central contemporary theoretical and doctrinal issues related to the *Charter* and entrenched bills of rights more generally;
- Appreciate the promise as well as the limits of *Charter* adjudication;
- Critically examine the role that the *Charter* plays in contemporary Canadian society, including its potential for effecting progressive social change; its location within Canadian democratic governance; its relationship to power, privilege, and social inequality; its ability to mediate between cultures/individuals/communities;
- Develop their own assessment of the jurisprudence and/or of pursuing constitutional rights as a means of citizen engagement and achieving social justice objectives.

**REQUIRED MATERIALS:**

1. The readings listed below.
  - The materials will be distributed on Moodle and will be placed on reserve. You will need to download some materials from UVic libraries and/or other sites (CanLII, LegisInfo). Links will be posted.
  - Please note that there is an access fee for the copyrighted materials (i.e., chapters from books) that can be paid at the CDC.

## 2. *Constitution Act, 1982*

- Available online: [http://laws.justice.gc.ca/en/const/annex\\_e.html](http://laws.justice.gc.ca/en/const/annex_e.html)

### **RECOMMENDED TEXTS:**

To familiarize yourself with the jurisprudence under a particular section of the *Charter*, please consider consulting one of the following texts:

- Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 2005).
- Peter W Hogg, *Constitutional Law of Canada*, 2010 Student Edition (Carswell).

### **TEACHING AND EVALUATION METHODS**

The course will be conducted as a seminar. Class time will involve some lectures, as required to provide context and set up the themes and issues, but the success of the course will depend on students' willingness to critically engage with the material and in discussions. A structured class discussion leader assignment (described below) will help facilitate class discussions. Class time may also involve exercises and guest speakers.

### **Class participation -- 10%**

Full marks will be given for students with satisfactory attendance, participation in class discussions, and handing in a paper proposal and a preliminary annotated bibliography. If a student does not complete either component of the participation grade, I will deduct grades accordingly.

*Attendance and participation in discussions (5%):* This allocation of marks is intended to ensure the success of the seminar. Students will of course have occasions during the term where they cannot make it to class. If it becomes necessary for you to miss more than 2 classes, please discuss your situation with me. I will ordinarily require students missing more than 2 classes to submit a 1-2 page reflection on the week's readings. Similarly, students are not expected to speak in every class – we are not all extroverts after all. However, if a student seems particularly reluctant to join in class discussions, I may ask that student for a few written reflections as a substitute.

*Paper proposal and preliminary annotated bibliography (5%):* Students are required to hand in a brief paper proposal and bibliography of 2-5 pages. The proposal itself can be a couple of paragraphs or a page describing your topic, the main questions you want to pursue, and how you intend to go about your argument. The bibliography should contain brief annotations explaining what the source is about and how it pertains to your research (the annotations can be longer if that is useful to you). The purpose of this exercise is to ensure that you have chosen a topic and started

work on your paper and to permit a form of conversation between us on your paper topic – I will give feedback on these proposals. Orient your proposal and bibliography to these purposes. **The proposal and bibliography is due on March 8.** (Feel free to hand these in earlier.)

### **Class discussion leader – 10%**

This component will involve you preparing for an assigned class by identifying a discussion point and then presenting the point in class, explaining/justifying your choice (i.e., why it is important, how it relates to course themes and issues, why your position is the right one, etc). This may take many forms: you might select a quotation or a pair of quotations from the readings; you might bring a pertinent newspaper article to our attention; you might write a brief response to one of the readings; you might raise a question or two and discuss the significance of these questions; or, you might come up with other ways to launch our discussions. The point of the exercise is to try to provoke discussion and challenge the class. If there are materials you want to bring to the class' attention (e.g., a newspaper article), please bring it to my attention by 6 PM the evening before the class in question so that I can distribute the materials appropriately.

One of three marks will be assigned for this component: 0, 7 or 10 (out of 10). 0 will be assigned only if the assignment has not been completed. Most people will receive a 7 for completing this assignment and marks of 10 will be reserved for students who attack this role with thought, creativity, and succeed in provoking a good discussion in class.

### **Paper – 80%**

The primary form of evaluation will be a research paper on a topic of your choosing. I am available to discuss paper topics but the only mandatory conversation about your paper is the proposal and bibliography as described above. Papers should be 20-25 pages long (standard letter paper, 1 inch margins, 12 pt font, Times New Roman). If you hand in an excessively long paper, there is a risk that I will stop reading it before it finishes. **Papers are due on April 5 by 3:30pm.** Please hand in hard copies to Rosemary Garton in room 225.

*Major Paper Option:* Your paper may be used to fulfill the Faculty's major paper requirement (7500 words, or approximately 30 standard pages at 250 words per page, not including footnotes and appendices). It must also receive a grade of C+ or better. Students who wish to use their paper as a major paper must receive prior permission from the instructor and must register the paper with the Associate Dean's office. A limited number of students will be granted permission.

*Late Policy:* Extensions will be granted at my discretion (subject to any accommodation measures discussed with the Associate Dean). Students experiencing difficulty in meeting due dates should discuss the problem with before the due date. Late papers will incur a reduction of 1 letter grade for every partial day late. For example, a paper that is ½ day late and is graded as a B+ will receive a letter grade of B. If the same paper were 1.25 days late, it would receive a letter grade of B-.

## THE CALCULATION OF GRADES

The Law Faculty uses the following marking scheme to determine your final letter grade

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 excellent grasp in one area balanced with satisfactory grasp in the other area.
B	5	70-74%	
B-	4	65-69%	
C+	3	60-64%	Satisfactory or minimally satisfactory performance.
C	2	55-59%	These grades indicate a satisfactory performance and knowledge of subject matter.
D	1	50-54%	Marginal performance. A student receiving this grade demonstrates a superficial grasp of subject matter.
F	0	49 and below	Unsatisfactory performance.

### REGULATIONS AND POLICIES:

Students should be familiar with the regulations and policies contained in the University of Victoria Calendar, 2010-2011 ("U Vic Calendar"), both generally and specifically for the Faculty of Law.

*Academic Integrity:* As part of the academic community of both the Faculty of Law and the University as a whole, academic integrity is centrally important in the work of faculty and students. Please consult the University Calendar for policies respecting paraphrasing, plagiarism, and cheating. If you have any concerns or questions, or require clarification, do not hesitate ask me. The policy on academic integrity can be found on the web at the following address:

<http://web.uvic.ca/calendar2010/FACS/UnIn/UARe/PoAcI.html>

## Topics & Readings

The readings and schedule may be adjusted to respond to student interest and workload as the course unfolds (note the open classes, March 22 and March 31). I also anticipate that some readings may be excerpted and others may be distributed amongst the class, so that some students read one piece while others read a different piece.

### PART I – Introduction: Themes and Debates

January 4: Class administration, overview

January 6: What are rights? Sources, types, and critiques

Tom Campbell, “The Reputation of Rights” (chpt 1) from *Rights. A Critical Introduction*, (Routledge, 2006), pp 3-21.

Duncan Ivison, “Statuses, Instruments and Conduits”, excerpt from Chpt 2 in *Rights* (Montreal & Kingston: McGill-Queen’s University Press, 2008), pp. 26-29.

Dominique Clement, excerpt from chpt 1 from *Canada's Rights Revolution. Social Movements and Social Change, 1937-1982* (UBC Press, 2008), pp 5-10.

January 11: Rights and the Charter in historical perspective

Dominique Clement, *Canada's Rights Revolution. Social Movements and Social Change, 1937-1982* (UBC Press. 2008), chptr 2 (pp. 17-35).

Peter H. Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms” (1983) 61 Canadian Bar Review 30-54.

January 13: Rights in a liberal democracy: The role of courts

Alexander M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 2d ed (Yale University Press 1962), excerpt: pp. 16-33

Joel Bakan, Chptr 2, *Just Words. Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), pp. 15-42

January 18: Rights in a liberal democracy: The role of legislatures

Jeremy Waldron, “A Right-Based Critique of Constitutional Rights” (1993) 13 Oxford J of Legal Studies 18; excerpt: pp 18-20, 31-51

Jeffrey Goldsworthy, “Judicial Review, Legislative Override, and Democracy” (2003) 38 Wake Forest Law Rev 451-472

January 20: Dialogue and other models

Janet L Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 69 *Modern Law Rev* 7-28

## **PART II – Economic and Social Rights**

January 25: Introduction - overview, cases for/against

Patrick Macklem, "Social Rights in Canada" in Daphne Barak-Erez & Aeyal M Gross, eds, *Exploring Social Rights. Between Theory and Practice* (Hart Publishing, 2007), pp. 213-242 (Excerpt TBD)

Martha Jackman, "What's Wrong with Social and Economic Rights?" (2000) 11 *NJCL* 235-46.

Joel Bakan, "What's Wrong with Social Rights?" in *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) 134-141.

Charlottetown Accord, Social and Economic Union

<http://www.solon.org/Constitutions/Canada/English/Proposals/CharlottetownLegalDraft.html>

January 27: Poverty

*Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429

*P.D. v. British Columbia*, 2010 BCSC 290

Jane Matthews Glenn, "Enforceability of Economic and Social Rights in the Wake of *Gosselin*: Room for Cautious Optimism" (2004) 83 *Canadian Bar Review* 929-958

February 1: Health care

*Auton (Guardian ad litem of) v. British Columbia (AG)*, [2004] 3 SCR 657

*Chaoulli v Quebec (AG)*, [2005] 1 SCR 791

Sujit Choudhry, "Worse than *Lochner*?" in *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada*, Colleen M. Flood, Kent Roach, and Lorne Sossin, eds. (Toronto, Buffalo and London: University of Toronto Press, 2005), 75-100.

February 8: Social rights and rights strategies

Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Flood, Roach & Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005), 161-183.

Lucie White, "If you don't pay, you die': On Death and Desire in the Postcolony" in Daphne Barak-Erez & Aeyal M Gross, eds, *Exploring Social Rights. Between Theory and Practice* (Hart Publishing, 2007), pp 57-73.

Gavin W Anderson, "Social Democracy and the Limits of Rights Constitutionalism" (2004) 17 Can J L& Jur 31-59.

### **PART III – Labour & Protest**

February 10: Freedom of association past

Bryan D Palmer, "What's Law Got To Do With It? Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority" (2003) 41 OHLJ 465; excerpt: 465-471, 475-486 (Parts I, II, & IV of the article)

Joel Bakan, "Freedom of Association and the Dissociation of Workers" in *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) 77-86.

*Labour Trilogy: Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, *PSAC v Canada* [1987] 1 SCR 424, and *RWDSU v Saskatchewan* [1987] 1 SCR 460 (Excerpts TBD)

*Dunmore v Ontario*, [2001] 3 SCR 1016 (Excerpts TBD)

February 15: Freedom of association present:

*Health Services and Support — Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27

Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support case in Canada and Beyond" (2008) 37 Industrial Law Journal 25.

February 17: The October Crisis, 1970

Dominique Clément, "The October Crisis of 1970: Human Rights Abuses Under the War Measures Act" (2008) 42 Journal of Canadian Studies 160-178

- March 1: Civil disobedience and the view from the law
- Vinit Haksar, "The Right to Civil Disobedience" (2003) 41 OHLJ 407-426
- Everywoman's Health Centre (1988) Victoria Drive Medical Clinic Ltd v Bridges*, 78 DLR (4th) 529, 54 BCLR (2d) 273, [1990] BCJ No 2859 (CA)
- Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534, 91 OR (3d) 1, [2008] 3 CNLR 119, 295 DLR (4th) 108
- March 8: G8/G20 in Toronto, June 2010
- Canadian Civil Liberties Association reports: <http://ccla.org/our-work/focus-areas/g8-and-g20/>
- Janet Conway, "Civil Resistance and the 'Diversity of Tactics' in the Anti-Globalization Movement: Problems of Violence, Silence, and Solidarity in Activists Politics" (2003) 41 OHLJ 505-530
- Jackie Esmonde, "Bail, Global Justice, and the Limits of Dissent" (2003) 41 OHLJ 323-361

#### **PART IV – Rights & Culture, Communities & Individuals**

- March 10: Introduction
- Benjamin L Berger, "The Cultural Limits of Legal Tolerance" (2008) 21 The Cdn J of Law & Jurisprudence 245-277
- William Twining, "Human Rights: Southern Voices" (2006) 11 Review of Constitutional Studies/Revue d'études constitutionnelles 203-279 (Excerpts TBD)
- March 15: Same-sex marriage and religious belief
- MJ v Nichols*, 2009 SKQB 299
- Jennifer Nedelsky & Roger Hutchinson, "Clashes of Principle and the Possibility of Dialogue: A Case Study of Same-Sex Marriage in the United Church of Canada" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (UBC Press, 2008), pp 41-64.
- March 17: Aboriginal women, Indian status and First Nations citizenship
- Jo-Anne Fiske, "Constitutionalizing the Space to be Aboriginal Women: The Indian Act and the Struggle for First Nations Citizenship" in Y. Belanger, ed., *Aboriginal Self-*

*Government: Current Trends and Issues*, 3d ed. (Saskatoon: Purich Publishing, 2008), pp. 309 -331

*McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2009 BCCA 153 (Excerpts TBD)

Bill C-3 – legislative summary:

<http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=6949&Session=23&List=ls>

March 22: Section 25: Aboriginal rights and the Charter

*R v Kapp*, 2008 SCC 41 (Excerpts TBD)

John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), pp. 150-155

Celeste Hutchinson, "Case Comment on R. v. Kapp: An Analytical Framework for Section 25 of the Charter" (2007) 52 McGill LJ 173-190

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March 24: OPEN – class choice – equality issues, terrorism/security, rights to property, rights to privacy, more time on things covered .....

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## **PART V – Evaluating Rights**

March 29: Theoretical responses

Jennifer Nedelsky, "Reconceiving Rights and Constitutionalism" (2008) 7 Journal of Human Rights 139 -173

+ TBD

March 31: OPEN