

CONSTITUTIONAL LAW
Law 100 – Section A01
2011-2012

Faculty of Law, University of Victoria
Professor Gillian Calder

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Course Outline
Fall 2011

I. Course Description

This course is a required, first-year course which will enable students to develop the critical legal skills necessary to examine Canada's constitutional framework, including the judicial system, the division of powers, the treatment and rights of Aboriginal Peoples, and the Charter of Rights and Freedoms.

II. Course Objectives

Canadian Constitutional law is a large, complex and constantly changing subject. As such, this course cannot be comprehensive in its scope, or in its treatment of any particular constitutional issue. Instead, the course aims to:

- stimulate your interest in constitutional law and the ways in which constitutional law directly affects your life;
- convey basic principles that underlie and inform the division of powers between the federal and provincial governments, the relationship between Aboriginal peoples and the Canadian state, and the rights enumerated in the *Canadian Charter of Rights and Freedoms*;
- enable you to identify constitutional issues and to make persuasive and effective constitutional law arguments and counter-arguments; and
- provide you with an opportunity to examine and discuss the political forces and theoretical debates that shape constitutional law.

III. Administrative Details

A. Class location and Times

Fall: Tuesdays and Thursdays, 1:30 – 3:00
Room 158

B. Office Hours

I have an open door policy. If my door is open and I am in my office, you are more than welcome to drop by and ask a question. Please also feel free to call me at 472-5247, e-mail me at gcalder@uvic.ca, or stop me in the hall at any time to talk about the course or to set an appointment time to meet.

IV. Materials

A. Required Materials

The Constitutional Law Group, eds., *Canadian Constitutional Law* (Emond Montgomery, 2010) 4th edition, and supplements. (Supplement is available at: <http://www.emp.ca/index.php/hotproperty/property/law-school/canadian-constitutional-law-4th-edition>).

Department of Justice, *A Consolidation of the Constitution Acts 1867 to 1982* (Ottawa: Canadian Government Publishing, 2001).

Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991). (This will be a handout in the Spring).

B. Recommended Materials (on reserve)

Peter W. Hogg, *Constitutional Law of Canada, 5th Edition*

Peter W. Hogg, *Constitutional Law of Canada: 2011 Student Edition*

John Borrows, *Canada's Indigenous Constitution* (Toronto: U of T Press, 2010).

Other materials may be placed on reserve in the library, or you may be given an internet site to consult, for example if a new case is released or to supplement your reading or interest. The course has a Moodle site, <http://moodle.uvic.ca/course/view.php?id=17710> where additional materials may also be posted.

V. Course Website and Listserv

The course website can be found at: <http://moodle.uvic.ca/course/view.php?id=17710>. This site will be used to post course materials, handouts and other course information. In addition we have a listserv which I will use on occasion to notify you of changes to the reading schedule, class meetings, etc.

VI. Teaching Methodology, Attendance and Participation

This course will be taught through a combination of lectures, class discussion and take-home exercises. The goal is to have an active and engaged class room environment. In this regard, it is my expectation that students will have read and thought about the assigned materials before they come to each class. Each class will be taught on the assumption that students are prepared to discuss the assigned materials.

There will, of course, be times when you will be unable to attend class due to illness, an unexpected occurrence or for other reasons. If you miss a class due to these reasons, you should feel free to come and discuss with me material that was covered in the class you were unable to attend. Please make note of the university's regulations on attendance and assignments, reproduced in part below.

If you would like to discuss classroom, assignment or exam accommodation necessitated by a permanent or temporary disability, or for other reasons, please see Associate Dean Heather Raven as soon as possible.

VII. Classroom Climate

An inclusive and respectful classroom environment is crucial to a positive learning experience. To ensure that all students feel welcome and able to participate in class discussions, we must strive to be courteous and considerate in our use of language and examples, and the manner in which we engage with each other individually and as a group. The University and Faculty are committed to promoting, providing and protecting a positive, supportive and safe learning and working environment for all their members. We will need to work together to ensure that all aspects of this class live up to this commitment. If you have any concerns about the climate of the class, please feel free to speak with me.

VIII. Evaluation and Expectations

A. Fall Term

- take-home exam, worth 100% of your fall term grade
to be picked up: Monday, December 5, 2011 at 4:00 p.m. (to correspond with the end of the LLP exam)
due: Wednesday, December 7, 2011 at 4:00 p.m. in the assigned room

B. Spring Term

- take-home examination, worth 100% of your final mark (or 70% of your final mark if first term mark is higher)
to be picked up: TBD
due: TBD

C. Detailed Assessment Expectations

Fall take-home examination

Length: there will be a set page limit

The examination at the end of the fall term will be an open-book, 48-hour take-home exam. The exam will cover all of the material assigned for the fall term. The exam will be based primarily on a hypothetical problem. Procedure will be discussed in detail in class. Please note policy on extensions set out below.

Spring take-home examination

Length: there will be a set page limit

The examination at the end of the spring term will also be an open-book, take-home exam. The exam will cover all the material assigned for the year, with primary emphasis on the spring term. The exam may include both problem and essay style questions. Procedure will be discussed in detail in class.

D. Page length

“Pages” mean letter-size (8 ½" x 11") paper, double-spaced, typed, with 12 point font and 1" margins. Students must use Times New Roman Font.

Any examination that exceeds page limits will be docked one grade level (for example, A down to A-, B+ down to B) for each partial page over the limit.

IX. Regulations

- A. Students should obtain and review all regulations and policies contained in the University of Victoria Calendar, 2011-2012 (“U Vic Calendar”), both generally and specifically for the Faculty of Law.
- B. The examinations in this course will be open-book.
- C. There will be no extensions permitted for take-home examinations (see U Vic Calendar for regulations which pertain to special examinations). A late examination, without accommodation, will be penalized one grade level (for example, A down to A-, B+ down to B) for each partial day past the due date.
- D. Academic integrity is expected of all participants in the University Community. **Please familiarize yourselves with the University’s Policy on Academic Integrity set out in the U Vic Calendar; and on-line at:**
<http://web.uvic.ca/calendar2011/FACS/UnIn/UARE/PoAcI.html>
- E. The following breakdown of letters and percentages is the one that I use to determine course grades:

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. These grades indicate a satisfactory performance and knowledge of subject matter.
C	2	55-59%	
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.
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X. December Examination and the Fall Term

A. The Fall Term and the Calculation of Final Grades

The mark you receive in the Fall term (assignment and December examination) is potentially worth 30% of your final grade for the course. However, it will count as 25% of the final grade in the course **ONLY** if it is higher than the mark that you receive on your final examination. That is, if the grade for the Fall Term is lower than the mark you receive on your final examination your Fall term mark will not count and your Spring term mark will count for 100% of your final grade. This means that the December examination can help your final grade but cannot hurt it.

B. A Mandatory Requirement – Penalty for Failure to Write the December Examination

The December examination in this course **MUST BE WRITTEN**, *i.e.*, it is **COMPULSORY**. **In the absence of a documented medical or other acceptable reason, failure to write the examination in December will mean that a penalty of one grade point will be deducted from your final grade in April.** (For example, if this penalty were to be applied, a final grade of B+ would become a B.)

C. Establishing Acceptable Reasons for Failure to Write December Examination

An acceptable reason for not writing a December examination is a reason that would normally justify a Special Examination in a course (*i.e.* illness, family affliction or other pressing special circumstances) and the procedures to be followed to establish that an acceptable reason exists are the same as those that apply to Special Examinations. Among other things, these procedures require that you contact the Associate Dean as soon as possible, and no later than five days after the scheduled date of the examination, to inform her of the problem and provide the documentation necessary to substantiate your grounds for missing the examination.

(All students should ensure that they are familiar with the Faculty's Regulations regarding Special Examinations that are set out in the calendar and posted on the main notice board.)

D. Writing the December Examination on a Deferred Basis

A student who establishes an acceptable reason for failing to write the December examination on the scheduled date may be granted special permission to write the examination on a deferred basis, **provided that he or she is capable of doing so within the regular examination period in December.** In such a case, the December examination grade will count in the calculation of

the final grade for the course in the usual way. Arrangements to write an examination on a deferred basis must be made through the Associate Dean's office and an undertaking regarding non-discovery of the contents of the examination will be required.

A student who has an acceptable reason for failing to write a December examination on the scheduled date and who cannot write the examination within the regular examination period, will not be allowed to write the examination at a later date and have it count in the calculation of his/her final grade for the course. In such a case, the penalty for failure to write the examination will not apply and calculation of the final grade will be made on the basis of the final exam alone.

E. Relevance of December Examination in Other Contexts

Students should also be aware that, although writing the December examination in this course cannot adversely affect your final grade in the course, December grades for first year students have recently become relevant in other contexts. For example, you may be asked or required to provide your unofficial December grades to prospective employers. The law school will refer to these grades if you apply for a summer research position. And, the Director of Co-op may refer to them if a First Year student is not performing well in the Co-op preparation course, to help her determine whether that student should be allowed to apply for a summer work term.

In addition, in January, the faculty will meet to review the December grades in order to identify and, where necessary, assist students who are experiencing academic difficulties. A grade of D or F in the December examination in this course may result in remedial work of some kind being required.

XI. Detailed Outline

A. Syllabus: Fall Term

The attached syllabus should serve as *a reading guide* for the fall term. The listed subjects are not exclusive, but highlight the key questions and cases that will form the basis for the class discussion. We may move more quickly or more slowly through certain material, and we may consider additional cases, legislation and legal issues that arise throughout the year. Any revisions to the reading list will be announced in class and posted on the website. A revised syllabus of materials covered will be handed out to each student with each of the assignments and examinations.

PART ONE: Federalism

1. Introduction to Canadian Constitutional Law

a. What is a Constitution?

Reading: Constitutional Law Group (“CLG”), 1-11
Recommended Hogg: Chapter 1
Chapter One: *Canada’s Indigenous Constitution*

- *What is a Constitution?*
- *What is Federalism?*
- *Elements of the Canadian Constitution*
- *Sources of the Canadian Constitution*
- *Unlearning our assumptions*

b. The Nature of Constitutional Law

Reading: CLG, pp. 11-27

- *Reference Re Secession of Quebec*

c. Methods of Constitutional Argument

Reading: CLG, 29-54
Recommended Hogg: Chapter 4

- *Judicial Review and Legitimacy*
- *Imperial Tobacco*
- *Constitutional Interpretation*
- *Organizing Principles*
- *Edwards v. AG Canada*

2. Historical Context: From Contact to Confederation

Reading: CLG 63-94
Recommended Hogg: Chapter 2

- *History and mythology*
- *Pre-contact, contact and the myth of terra nullius*
- *Confederation*

3. Principles of Interpretation

a. Evolution of the Division of Powers

Reading: CLG, 95-119; 129-158

- *Values Informing the Division of Power*
- *Case study: Citizen's Insurance v. Parsons*
- *Russell v. The Queen*
- *Hodge v. The Queen*
- *Local Prohibition Reference*

- the early 20th century
- *Board of Commerce*
- *Fort Frances*
- *Toronto Electric and Snider*
- *King v. Eastern Terminal*

b. Depression and the New Deal

Reading: CLG, 159-188

c. Pith and Substance

Reading: CLG, 207-235
Recommended Hogg: Chapter 15

- *values informing the interpretation of the division of powers*
- *characterization of laws*
- *pith and substance*
- *R. v. Morgentaler*
- *Reference re: EI*

d. Overlap and Interjurisdictional Immunity

Reading: CLG, 235-249; 254-273

- *necessarily incident*
- *double Aspect*
- *interjurisdictional immunity*
- *Lacombe*
- *Pilots Association*

e. Paramountcy

Reading: CLG, 272-294

Recommended Hogg: Chapter 16

- *operability*
- *Multiple Access Ltd. v. McCutcheon*

4. Principles in Action: Maternity and Parental Leave

Reading: *Reference re Employment Insurance Act, ss. 22, 23, 2005 SCC 56.*
CLG, 54-60

- *constitutionality of maternity and parental leave*
- *strategic litigation*
- *intervenors*

5. Peace, Order and Good Government

a. Historical Development

Reading: **CLG, 295-323**
Recommended Hogg: Chapter 17

- *Historical Development of POGG*
- *Reference Re Anti-Inflation Act*

b. Recent Developments

Reading: **CLG, 323-347**

- *Regulation of the Environment*
- *R. v. Crown Zellerbach Canada Ltd.*
- *R. v. Hydro-Quebec*
- *Friends of the Oldman River v. Canada (Minister of Transport)*

6. Economic Regulation (Trade and Commerce)

a. Property and Civil Rights

Reading: **CLG, 349-381**
Recommended Hogg: Chapters 20, 21

- *Property and Civil Rights*
- *Provincial Powers over Economic Regulation*
- *Canadian Egg Marketing Agency v. Richardson*
- *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board*
- *AG Manitoba v. Manitoba Egg and Poultry Association*

b. Federal Powers over Economic Regulation

Reading: CLG, 381-413

- *Regulation of Interprovincial and International Trade*
- *King v. Eastern Terminal Elevator Co.*
- *Federal Powers over Economic Regulation*
- *The Queen v. Klassen*
- *Labatt Breweries of Canada Ltd. v. AG Canada*
- *General Motors of Canada Ltd. v. City National Leasing*
- *Reference re: Securities Act*

c. Principles of Federalism in Action: homelessness

Reading: CLG, 464-477

- *fact pattern on division of powers problem*
- *federal spending power*

7. Morality and the Criminal Law

a. Federal Powers over Criminal Law

Reading: CLG, 421-450
Recommended Hogg: Chapter 18

- *review: P.A.T.A.*
- *Federal Powers over Criminal Law*
- *Reference re Validity of Section 5(1) of the Dairy Industry Act (Margarine Reference)*
- *RJR MacDonald Inc. v. Canada (AG)*
- *Reference re Firearms Act*
- *Reference re: Assisted Human Reproduction Act*

b. Provincial Powers to Regulate Morality and Public Order

Reading: CLG, 451-462

- *Provincial Power to Regulate Morality and Public Order*
- *Nova Scotia Board of Censors v. McNeil*
- *Westendorp v. The Queen*
- *R. v. Morgentaler*

B. Syllabus: Spring Term

This is the *tentative* schedule of topics that will be covered in the spring term. As the law shifts, so will our syllabus. A detailed syllabus will be handed out to students at the first class, Wednesday, January 4, 2012.

PART TWO: Aboriginal Peoples and the Constitution

1. Settler Nations and First Nations
2. Aboriginal Rights
3. Aboriginal Title
4. Treaty and Other Rights
5. Self-Governance

PART THREE: The Canadian Charter of Rights and Freedoms

1. Application of the *Charter*
2. *Charter* remedies
3. Limiting and Overriding the *Charter*
4. Equality
5. Commercial, Hate and Sexually Explicit Speech
6. Life, Liberty and Security of the Person
7. Poverty and the *Charter*