

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

NATIONAL COMMITTEE ON ACCREDITATION

SYLLABUS

CANADIAN CONSTITUTIONAL LAW

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CANADIAN CONSTITUTIONAL LAW

Scope of the Course: Constitutional law is distinguished by what it does (it creates the organs of the state and defines and limits their powers) and by its status (it is the supreme law with which all other laws and government actions must comply). The goal of this course is to provide students with an introduction to the various components of Canadian constitutional law, and to the basic principles necessary to understanding and applying the provisions of the constitution in legal practice.

The readings begin, in Part I of the course, with an introduction to the nature and sources of the Canadian constitution, followed by an overview of the procedures for amending the constitution, and an introduction to the federal nature of the state and the role of the judiciary in upholding the federal division of legislative powers.

In Part II, the readings explore the federal division of legislative power in sections 91-95 of the *Constitution Act, 1867* in more detail. The readings on federalism begin with an examination of the general principles of interpretation, and then turn to a study of a handful of the most important legislative powers, including the federal powers in relation to “peace, order and good government” [opening language of s.91], “trade and commerce” [s.91(2)], “criminal law” [s.91(27)], and the provincial power in relation to “property and civil rights” [s.92(13)].

In Part III of the course, the readings examine the rights and freedoms protected by the Canadian constitution, including the rights and freedoms guaranteed by the 1982 *Charter of Rights and Freedoms*. The readings in Part III begin with an examination of the language rights protected by the *Constitution Act, 1867*, the *Charter*, and the *Manitoba Act*. The next topic is the distinct constitutional position of Aboriginal peoples. The readings examine federal and provincial powers to pass laws in relation to Aboriginal peoples and lands, and the Aboriginal and treaty rights entrenched in s.35 of the *Constitution Act, 1982*. The readings then focus on four of the most important rights-conferring provisions of the *Charter* – freedom of conscience and religion [s.2(a)], freedom of expression [s.2(b)], life, liberty and security of the person [s.7] and equality rights [s.15] – as well as the provisions dealing with the application of the *Charter* [s.32], reasonable limits [s.1], the notwithstanding clause [s.33] and remedies [s.24, s.52].

Examination: The examination for this course will be a three-hour open book examination. The exam in the course may consist only of problem questions, or it may consist of a mix of problem questions, short answer questions and short essay questions.

A typical problem question will describe an actual or fictional statute (or other government action), and ask candidates to assess whether it is consistent with the provisions of the *Constitution Act, 1867* and/or the *Constitution Act, 1982*, and, if not, what the consequences are likely to be. Problem questions test candidates’ ability to identify constitutional issues, accurately state the applicable legal rules, apply those rules to novel situations, and draw

conclusions supported by analysis. In other words, problem questions require the exercise of independent judgment grounded in the application of general rules to specific fact situations. For candidates who lack experience writing such exam questions, familiarizing yourself with them through practice is essential. Candidates should practice by testing themselves, using the sample examination and perhaps by reviewing other samples of recent Canadian constitutional law examinations. Many Canadian law school libraries have copies of recent exams on file. In addition, some Canadian constitutional law professors have course websites with sample examinations and model answers.

Short answer questions test candidates' ability to succinctly and correctly evaluate statements about the content of Canadian constitutional law (e.g.: "Section 7 of the *Charter of Rights and Freedoms* guarantees to patients the right to purchase private health insurance if they face unreasonable delays in accessing public health services: true or false?").

Short essay questions test whether candidates' have critically engaged with the material listed in the syllabus and have started to form their own opinions about the strengths and weaknesses of Canadian constitutional law (e.g.: "Would you favour the repeal of s.33 of the *Charter of Rights and Freedoms*?").

Required Readings: The required readings under each topic consist of the applicable provisions of the text of the constitution, leading cases from the Supreme Court of Canada (and one case from the Privy Council), and relevant chapters (or parts of chapters) from the leading English-language textbook on Canadian constitutional law: Peter Hogg, *Constitutional Law of Canada* Student Edition (Toronto: Carswell, published in a revised version annually) (this edition is referred to below as "Hogg").

The case law you are required to read is accessible in the Canadian Supreme Court Reports (S.C.R.), or in the Appeal Cases (A.C.) in the case of Privy Council (pre-1949) decisions. You may access the full text of all SCC judgments listed below at the Supreme Court of Canada judgment website. See <http://scc.lexum.umontreal.ca>.

I recommend that candidates purchase a copy of the most recent student edition of Professor Hogg's book. The student edition contains all of the chapters from the Hogg book included in the required readings below. Professor Hogg's book is also available in law libraries in a looseleaf format updated annually. Candidates are advised to use the most recent student edition of the Hogg book (or the looseleaf version) when completing the readings below, because it will contain the most up-to-date analysis of recent developments. Using a Hogg student edition from 2007 or 2008 is also acceptable, since the content of Canadian constitutional law, and thus of the Hogg textbook, does not change dramatically in a year or two. Using the Hogg student edition from 2006 or earlier is not advisable, as you will be missing too many significant new developments in the case law.

Candidates should make regular reference to the texts of Canadian constitutional documents relevant to the topics covered in this course, especially the provisions of the *Constitution Acts* of 1867 and 1982 that are included on the list of required readings below. The key

provisions are excerpted in Appendices I and III of the Hogg textbook. The full text of the *Constitution Acts* of 1867 and 1982 can also be found on the Department of Justice website at <http://laws.justice.gc.ca/en/Const/ConstDoc.html> and on the website of the Canadian Legal Information Institute at <http://www.canlii.org>. For those who are interested in purchasing a separate volume containing a more comprehensive collection of constitutional documents (it is not necessary to do so), the best volume is B.W. Funston and E. Meehan, *Canadian Constitutional Documents Consolidated* 2d ed. (Carswell, 2007). The Department of Justice also publishes a handy volume entitled *A Consolidation of the Constitution Acts 1867 to 1982*, available for purchase online at <http://www.fedpubs.com/subject/constitution/constitutions.htm>.

Candidates should aim to develop an understanding of the basic principles of Canadian constitutional law that starts with the text of the Constitution Acts and is then deepened and extended by the principles developed through judicial interpretation of the text evident in the leading cases listed on the syllabus. The Hogg textbook should serve to provide historical context and clear summaries of the law. Candidates are warned against focusing their study exclusively on the readings from the Hogg textbook. While the Hogg book is a marvellous source, it is important to give equal time to the study of the constitutional provisions and the leading judicial decisions listed on the syllabus. The exam will test knowledge derived from all three sources – from the constitutional provisions themselves, from the case law, and from Hogg. An adequate understanding of and capacity to work with Canadian constitutional law requires that you work with a combination of the constitutional text, the case law and scholarly analysis.

Topics to be covered and required readings

The outline that follows gives the full requirements of the course. All of the required readings are examinable. As described above, the course is divided into three parts: basic concepts, distribution of powers and rights and freedoms.

The references to the chapters in the Hogg textbook below use the chapter numbers from the 2009 student edition. Some of the chapter numbers in earlier editions of the Hogg textbook are different. If you are using an earlier edition, you will be able to locate the correct chapters by chapter title.

Part I: Basic Concepts

1. Sources and Nature of the Constitution

Hogg, chapter 1, "Sources"

[Reference re Secession of Quebec, \[1998\] 2 S.C.R. 217](#)

2. Amending Procedures

[Constitution Act, 1982, Part V, ss.38-49](#)

Hogg, chapter 4, "Amendment", and chapter 5.7, "Secession"

[Reference re Secession of Quebec, \[1998\] 2 S.C.R. 217](#)

3. Federalism and Judicial Review

[Constitution Act, 1867, ss.91-95](#)

[Constitution Act, 1982, s.52](#)

Hogg, chapter 5, "Federalism"

Part II: Distribution of Powers

4. Principles of Interpretation

Hogg, chapter 15, "Judicial Review on Federal Grounds"

[Canadian Western Bank v. Alberta, \[2007\] 2 S.C.R. 3](#)

5. Paramountcy

Hogg, chapter 16, "Paramountcy"

[Rothmans, Benson & Hedges Inc. v. Saskatchewan, \[2005\] 1 S.C.R. 188](#)

6. Property and Civil Rights

[Constitution Act, 1867, s.92\(13\)](#)

Hogg, chapter 21, "Property and Civil Rights"

[Citizens' Insurance Co. v. Parsons, \(1881\) 7 A.C. 96 \(P.C.\)](#)

[Chatterjee v. Ontario \(Attorney General\), 2009 SCC 19](#)

7. Trade and Commerce

[Constitution Act, 1867, s.91\(2\), s.92\(13\), S.92A](#)

Hogg, chapter 20, "Trade and Commerce"

[General Motors of Canada Ltd. v. City National Leasing, \[1989\] 1 S.C.R.641](#)

8. Peace, Order and Good Government

Constitution Act, 1867, s.91 (opening words)
Hogg, chapter 17, “Peace, Order, and Good Government”
[Reference re Anti-Inflation Act, \[1976\] 2 S.C.R. 373](#)
[R. v. Crown Zellerbach Canada Ltd., \[1988\] 1 S.C.R. 401](#)

9. Criminal Law

Constitution Act, 1867, s.91(27), s.92(15)
Hogg, chapter 18, “Criminal Law”
[Re Firearms Act, \[2000\] 1 S.C.R. 783](#)

Part III: Human Rights and Freedoms

10. Language Rights

Constitution Act, 1867, s.133
Manitoba Act, 1870, s.23 (see Hogg, chapter 56, note 40)
Constitution Act, 1982, ss.16-23
Hogg, chapter 56, “Language”

11. Aboriginal and Treaty Rights

Constitution Act, 1867, s.91(24)
Constitution Act, 1982, s.25, s.35
Hogg, chapter 28, “Aboriginal Peoples”
[R. v. Van der Peet, \[1996\] 2 S.C.R. 507](#), per Lamer C.J., paragraphs 1-94

12. Interpreting the Charter of Rights and Freedoms

Hogg, chapter 36, “Charter of Rights”

13. Application of the Charter of Rights and Freedoms

Constitution Act, 1982, s.32
Hogg, chapter 37, “Application of Charter”
[Eldridge v. British Columbia \(Attorney General\), \[1997\] 3 S.C.R. 624](#), paragraphs 19-52
[Greater Vancouver Transportation Authority v. Canadian Federation of Students](#), 2009 SCC 31, paragraphs 13-24

14. Override of Rights

Constitution Act, 1982, s.33

Hogg, chapter 39, “Override of Rights”

[Ford v. Quebec \(Attorney General\)](#), [1988] 2 S.C.R. 712, Part V, pages 733-745

15. Limitation of Rights

Constitution Act, 1982, s.1

Hogg, chapter 38, “Limitation of Rights”

[R. v. Oakes](#), [1986] 1 S.C.R. 103, per Dickson C.J., Part V of his opinion, pages 135-142

16. Freedom of Conscience and Religion

Constitution Act, 1982, s.2(a)

Hogg, chapter 42, “Religion”

[Syndicat Northcrest v. Amselem](#), [2004] 2 S.C.R. 551, per Iacobucci J., paragraphs 1-104

[Reference re Same-Sex Marriage](#), [2004] 3 S.C.R. 698, paragraphs 47-60

[Alberta v. Hutterian Brethren of Wilson Colony](#), 2009 SCC 37

17. Freedom of Expression

Constitution Act, 1982, s.2(b)

Hogg, chapter 43, “Expression”

[Montréal \(City\) v. 2952-1366 Québec Inc.](#), [2005] 3 S.C.R. 141

18. Life, Liberty and Security of the Person

Constitution Act, 1982, s.7

Hogg, chapter 47, “Fundamental Justice”

[Chaoulli v. Quebec \(Attorney General\)](#), [2005] 1 S.C.R. 791, per McLachlin C.J./Major J. and Binnie/Lebel JJ., paragraphs 102-279

[Charkaoui v. Canada \(Citizenship and Immigration\)](#), [2007] 1 S.C.R. 350

19. Equality Rights

Constitution Act, 1982, s.15, s.28

Hogg, chapter 55, “Equality”

[Andrews v. Law Society of British Columbia](#), [1989] 1 S.C.R. 143

[Law v. Canada \(Minister of Employment and Immigration\)](#), [1999] 1 S.C.R. 497

[R. v. Kapp](#), [2008] 2 S.C.R. 483

20. Remedies

Constitution Act, 1982, s.24, s.52

Hogg, chapter 40, “Enforcement of Rights”

[*Schachter v. Canada*, \[1992\] 2 S.C.R. 679](#)

[*Vriend v. Alberta*, \[1998\] 1 S.C.R. 493](#), per Iacobucci J., paragraphs 129-179

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Internet Sites for Provincial Legislation

www.canlii.org

This is a listing for all the provinces and is highly recommended

Ontario:

<http://www.attorneygeneral.jus.gov.on.ca/english/legis/>

British Columbia (Queen's Printer):

<http://www.bclaws.ca/>

Alberta (Queen's Printer):

<http://www.qp.alberta.ca/>

Supreme Court Judgments:

<http://scc.lexum.umontreal.ca/en/index.html>