

Course Outline

COURSE:	LAWS 2501D – Law, State, and Constitution
TERM:	Winter 2015
PREREQUISITES:	LAWS 1000 [1.0], PAMP 1000 [1.0], PSCI 1000 [1.0] (No longer offered), PSCI 1001 and PSCI 1002 (no longer offered), PSCI 1100 and PSCI 1200.
CLASS:	Day & Time: Tuesday, 6:05pm – 8:55pm Room: Please check with Carleton Central for room location
Contract Instructor:	Darren Pacione
Contact:	Office: B 442 Loeb Office Hrs: Please make an appointment. Email: darren.pacione@carleton.ca

Academic Accommodations

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

Pregnancy obligation: write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details visit the Equity Services website: <http://www2.carleton.ca/equity/>

Religious obligation: write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details visit the Equity Services website: <http://www2.carleton.ca/equity/>

Academic Accommodations for Students with Disabilities: The **Paul Menton Centre** for Students with Disabilities (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or pmc@carleton.ca for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your

Letter of Accommodation at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (*if applicable*). After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (*if applicable*) at <http://www2.carleton.ca/pmc/new-and-current-students/dates-and-deadlines/>

You can visit the Equity Services website to view the policies and to obtain more detailed information on academic accommodation at <http://www2.carleton.ca/equity/>

Plagiarism

Plagiarism is presenting, whether intentional or not, the ideas, expression of ideas or work of others as one's own. Plagiarism includes reproducing or paraphrasing portions of someone else's published or unpublished material, regardless of the source, and presenting these as one's own without proper citation or reference to the original source. Examples of sources from which the ideas, expressions of ideas or works of others may be drawn from include but are not limited to: books, articles, papers, literary compositions and phrases, performance compositions, chemical compounds, art works, laboratory reports, research results, calculations and the results of calculations, diagrams, constructions, computer reports, computer code/software, and material on the Internet. Plagiarism is a serious offence.

More information on the University's **Academic Integrity Policy** can be found at: <http://www.carleton.ca/studentaffairs/academic-integrity/>

Department Policy

The Department of Law and Legal Studies operates in association with certain policies and procedures. Please review these documents to ensure that your practices meet our Department's expectations.

<http://www.carleton.ca/law/student-resources/department-policies/>

COURSE DESCRIPTION

This course examines themes concerning legal, political, and historical perspectives of the Canadian Constitution and related constitutional activism. Constitutional activism refers to the voices of interest groups (e.g. Women and

First Nations People) who sought entrenched language in the Constitution that 'recognized' their respective identities and political status. Through sustained engagement with archival documents, historical accounts, documentary film, political commentary, video archive of recent conference panels, legal analysis, and a guest lecture, students will examine the intersections between law, the state, and the constitution.

The course is divided into three parts: (1) The Canadian Constitutional Structure; (2) Constitutional Processes; and (3) Constitutional Politics and Activism. The first part will identify, situate, and offer competing accounts of the development and structure of Canada's current constitutional framework. It will interrogate key concepts including parliamentary sovereignty, the *Charter*, and federalism. The second part unpacks selected constitutional processes including aboriginal title, emergency powers, and referendums. Here, the course will explore critical perspectives emerging in First Nation, Rule of Law, and Nationalist scholarship. And the third part will engage with examples of constitutional activism including issues related to 'The Ad Hockers', The Women's Court of Canada, and Land Claim disputes.

LEARNING OBJECTIVES

The purpose of this course is to help students develop:

1. Knowledge of the political, legal, and colonial history of the framing of the Canadian constitution;
2. An understanding alternative and critical perspectives of constitutional concepts including sovereignty, theories on division of powers and the court system and judicial review;
3. Engage and assess current scholarly debates about the politics of law;
4. An understanding of constitutional activism;
5. A historically grounded approach through which students may interrogate questions and debates related to the Canadian constitution.

REQUIRED TEXTS

There is one required text for this course available at the bookstore:

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

Beyond this text, this course will make use of the CULearn learning management system. It will serve as an information hub for this course. Here you will find the course syllabus, access to the 'Ares' system, supporting materials to assist your reading and writing skills, and your grades. If you are having problems using the site please visit the Educational Development Centre's website for support: <http://www1.carleton.ca/lmssupport/students/>

SUPPLEMENTARY TEXTS

- Rosenfeld, Michael, and Andás Sajó, eds. (2012) *Oxford Companion of Comparative Constitutional Law*. Oxford: Oxford University Press.
- Macklem, Patrick (2001) *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press.
- Macklem, Patrick, et. al. (2010) *Canadian Constitutional Law*, 4th Edition. Toronto: Emond Montgomery Publications.
- Leuprecht, Christian and Peter H. Russell, eds. (2011) *Essential Readings in Canadian Constitutional Politics*. University of Toronto Press.
- Canadian Constitutional Law Blog: <http://www.thecourt.ca/>

EVALUATION

*** All components must be completed in order to get a passing grade.**

Note: Standing in a course is determined by the course instructor subject to the approval of the Department and of the Faculty Dean. This means that grades submitted by the instructor may be subject to revision. No grades are final until they have been approved by the Department and the Dean.

1. Documentary Response Paper (20%)

DUE: 24 FEBRUARY 2015 @ 6PM IN CLASS

The first writing assignment will be a ‘documentary response paper’. Students will write a 1200-1500 word critical commentary on one of the two films viewed before reading week: (1) *Dancing Around the Table: Parts One and Two* (1987) OR (2) *National Matters* (2010). Further assignment instructions will be posted on CULearn.

2. Book Review Essay (40%)

DUE: 24 March 2015 @ 6PM IN CLASS

Student will be expected to write a book review essay analyzing the following book:

- Borrows, John (2010) *Canada’s Indigenous Constitution*. Toronto: University of Toronto Press.

The book review essay is an evaluation, not only a summary, of the text. Students have the option of conducting research (e.g. case law, articles, books, etc.) beyond the assigned book, however additional research is not required. Further assignment instructions will be posted on CULearn.

3. Final Exam (40%)

DATE: TBA (During Final Exam Period - APRIL 11 – 23, 2015)

A closed book exam will be administered during the scheduled exam period. Please consult Scheduling and Examination Services for time, date, and location details.

LATE POLICY

Late submissions of any assignment will be accepted at the cost of three marks per day. Extensions are reserved for those moments when you find yourself in extenuating circumstances. Depending on the situation, documentation may be required.

ACADEMIC INTEGRITY

Please contact me if you require clarification on what the university considers academic dishonesty. For a list of violations, I refer you to the Student Affairs policy on **Academic Integrity** at <http://www.carleton.ca/studentaffairs/academic-integrity/>

CLASS SCHEDULE AND READINGS

PART I: The Canadian Constitutional Structure

WEEK 1 – Jan. 6: Introduction

Film:

- The Agenda with Steve Paikin. “The Constitution at 30”:
http://youtu.be/n-PdDjhi_eA?t=1s

Reading(s):

- Arthurs, Harry. “Constitutional Courage,” *McGill Law Journal* 49 (2004): 1-19.

WEEK 2 – Jan. 13: The Canadian Constitution: Key Developments

Reading(s):

- Macdonald, Roderick A. “Three Centuries of Constitution Making in Canada: Will there be a fourth?” *UBC Law Review* (1996) 30: 211-34.
- Peter H. Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms,” *The Canadian Bar Review* (1983) 61: 30-54.
- Robert C. Vipond, “1787 and 1867: The Federal Principle and Canadian Confederation Reconsidered,” *Canadian Journal of Political Science* (1989) 22(1): 3- 25.

Supplementary:

- Doughty, Arthur G. and Adam Shortt, ed. *Documents relating to the Constitutional History of Canada, 1759-1791* [Excerpt: pp. 597-661]
- Kennedy, W. P. M., ed. (1918) *Documents of the Canadian Constitution, 1759-1915*. Oxford University Press
- http://www.historyofrights.com/docs_committee.html

WEEK 3 – Jan. 20: Conceptualizing Sovereignty: A First Nation Perspective

Film:

- Bulbulian, Maurice. 1987. *Dancing Around the Table, Part One*. National Film Board of Canada. (57 mins)
 - Source: https://www.nfb.ca/film/dancing_around_the_table_part_one

Reading(s):

- Borrows, John. “Constitutional Law from a First Nation Perspective: Self Government and the Royal Proclamation,” *University of British Columbia Law Review* 28 (1994): 1-47. [Excerpts]
- Borrows, John. “A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government,” *Osgoode Hall Law Journal* 30.2 (1992): 291-353.

Supplementary:

- Asch, Michael and Patrick Macklem. “Aboriginal Rights and Canadian Sovereignty: An essay on *R. v. Sparrow*,” *Alberta Law Review* 21.2 (1991): 498-517.
- Asch, Michael. “From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution,” *Canadian Journal of Law and Society* 17 (2002): 23-39.

WEEK 4 – Jan. 27: Judicial Decision Making: Courts, and Administrative Tribunals

Guest Lecturer: Ron Ahluwalia

Reading(s):

- Beverley McLachlin, “Courts, Legislatures and Executives in the Post-Charter Era,” *Policy Options* (June 1999): 41-7.
- Bertha Wilson, “We Didn’t Volunteer,” *Policy Options* (April 1999): 8-11.

PART II: Selected Constitutional Processes

WEEK 5 – Feb. 3: Aboriginal and Treaty Rights

Film:

- Bulbulian, Maurice. 1987. *Dancing Around the Table, Part Two*. National Film Board of Canada. (50 mins)
 - Source: https://www.nfb.ca/film/dancing_around_the_table_part_two

Reading(s):

- Henderson, James (Sa'ke'j) Youngblood. "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada," *Australian Indigenous Law Review*. (2010) 14(2): 24-48
- Borrows, John. "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," *Osgoode Hall Law Journal* 37.3 (1999): 573-96.
- *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010
- "The Anniversary of *Delgamuukw v. The Queen*: Two Legacies" Available at: <http://www.thecourt.ca/category/cases/delgamuukw-1997/>

Supplementary:

- Asch, Michael. "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution," *Canadian Journal of Law and Society* 17 (2002): 23-39.

WEEK 6 – Feb. 10: Secession and Self-Determination: Quebec and Scotland

Willie's Views on Scottish Independence: <http://youtu.be/W6vDzf-wSbk>

Film:

- *National Matters: Quebec, Scotland, and Catalonia*. A documentary by Roger Boire and Jean-Pierre Roy. Montreal: L'Oeil Fou Inc., 2010. [Film: 92 mins.] [Library Reserve]

Reading(s):

- Choudhry, Sujit, and Robert Howse. "Constitutional Theory and the Quebec Secession Reference," *Canadian Journal of Law and Jurisprudence* 13.2 (2000): 143-69.
- Case: Reference re Secession of Quebec, [1998] 2 S.C.R. 217.
- Trudeau, Pierre. "Quebec and the Constitutional Problem," in Christian Leuprecht and Peter H. Russell, eds. (2011) *Essential Readings in Canadian Constitutional Politics*. University of Toronto Press, p. 331-56.
- Commentary on the Scottish Context: <http://www.scottishconstitutionalfutures.org/Resources/UsefulPublications/IndependenceReferendumLegalityandProcess/tabid/1781/Default.aspx>

WEEK 7 – Feb. 17: Reading Week – NO CLASS**WEEK 8 – Feb. 24: Emergency Powers, 1: National Security and Constitutional Law**

* Documentary Response Paper is due today *

Reading(s):

- Schmitt, Carl. (2005) *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, p. 1-15.
- Dyzenhaus, David. (2006) *The Constitution of Law: Legality in a Time of Emergency*. University of Toronto Press, Chapter 2.
- Dyzenhaus, David. “States of Emergency,” in Rosenfeld, Michael, and Andrés Sajó, eds. (2012) *Oxford Companion of Comparative Constitutional Law*. Oxford: Oxford University Press, p. 442-61.

WEEK 9 – Mar. 3: Emergency Powers, 2: Constitutional Challenges

Reading(s):

- Pacione, Darren. “The FLQ Trials, 1969-1971: Judicial Tensions and Constitutional Questions,” *Quebec Studies* 55 (2013): 101-18.
- Shapiro, Jonathan. “An Ounce of Cure for a Pound of Preventative Detention: Security Certificates and the *Charter*,” *Queen’s Law Journal* 33 (2008): 519-64.

PART III: Constitutional Politics and Activism

WEEK 10 – Mar. 10: Constitutional Activism, 1: Section 28 and the Ad Hockers

Film:

- *Constitute! Women’s Constitutional Activism*. A documentary by Susan Bazilli and Robert Rooney, and produced by the International Women’s Rights Project, 2006. [<http://constitute.ca/the-film/>] (33 mins).

Reading(s):

- McPhedran, Marilou. “Creating Trialogue: Women’s Constitutional Activism in Canada,” *Canadian Woman Studies/Les Cahiers de la Femme* 25.3-4 (2007): 6-17.
- McPhedran, Marilou. “The Fight for the Charter,” *Canadian Woman Studies/Les Cahiers de la Femme* 26.2 (2008): 80-4.
- Dobrowolsky, Alexandra. “Of ‘Special Interest’: Interest, Identity and Feminist Constitutional Activism in Canada,” *Canadian Journal of Political Science/Revue canadienne de science politique* 31.4 (1998): 707-42.

Supplementary:

- Dobrowolsky, Alexandra. (1996) *Politics of Pragmatism: Women, Strategic Representation, and Constitutionalism in Canada*. Ottawa: Carleton University, Department of Political Science, PhD Thesis. (Excerpts: pp. 28-99).

WEEK 11 – Mar. 17: Constitutional Activism, 2: ‘Women’s Court of Canada’

Reading(s):

- Majury, Diana. “Introducing the Women’s Court of Canada,” *Canadian Journal of Women and the Law* 18 (2006): 1-12.
- The Women’s Court of Canada: *Symes v. Canada* [2006] 1 W.C.R. 31: <http://www.thecourt.ca/2008/06/13/womens-court-symes-v-canada-2006-1-wcr-31/>
- Further reflections on the Women’s Court of Canada: http://www.law.utoronto.ca/documents/conferences/rewritingequality08_future.pdf

WEEK 12 – Mar. 24: Constitutional Activism, 3: Indigenous Politics

Book review is due today

Film:

- Palmater, Pamela. "Section 35's Empty Shell of Constitutional Promise": <https://www.youtube.com/watch?v=f3tBeoendQ>

Reading(s):

- Turpel, Mary Ellen. “Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences,” *Canadian Human Rights Year Book* 3 (1990): 3-45.

WEEK 13 – Mar. 31: Review Class