

The Supreme Court of Canada and Canadian Constitutionalism

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SYLLABUS

I. COURSE DESCRIPTION

The Supreme Court of Canada lies at the apex of the Canadian justice system and although it is not a “constitutional court”, it is the most important institution in articulating Canadian Constitutional Law. Judgments of the Supreme Court of Canada have been cited by other courts around the world, including by the Supreme Court of Israel. With the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, a “Canadian” constitutional model has been identified.

This course will examine the Supreme Court of Canada as the fountain of Canadian Constitutional Law. This course will also study the constitutional jurisprudence that the Supreme Court of Canada has created. It will draw upon the instructor and the students’ knowledge of other legal systems, specifically Israel and the United States, to critically examine the role of the Supreme Court of Canada and Canadian constitutional jurisprudence.

This course will examine selected topics in Canadian constitutional law including freedom of expression, freedom of religion, the right to life, liberty and security of the person and judicial independence.

II. LEARNING OBJECTIVES

The overall objective of this course is for students to gain a basic understanding of the Supreme Court of Canada and of the Canadian Constitution.

By the end of the course, students should be able to:

- Understand the history and the development of the Supreme Court of Canada;
- Understand the Supreme Court of Canada’s jurisdiction and the issues associated with this jurisdiction in both empirical and normative terms;
- Understand what is the “Constitution of Canada” and be able to identify its different components;

- Become familiar with the major components of the *Canadian Charter of Rights and Freedoms* and the issues raised in some of the landmark cases related to freedom of expression, freedom of religion, and the right to life, liberty and security of the person; and
- Understand some of the major issues regarding the Supreme Court of Canada's role in decision making and be able to critically evaluate different perspectives on the Supreme Court's decision making.

III. EVALUATION

TBD – LIKELY PAPER – FOR EXAMPLE

Your Final Paper can address any issue relating to the Supreme Court of Canada and/or the Canadian Constitution, in the broadest sense. You may expand upon an issue raised in the course or select an issue that was not raised in the course. You may also choose to compare how the Supreme Court of Israel and the Supreme Court of Canada has dealt with a particular substantive issue (e.g. freedom of expression, right to counsel, etc.) or compare a particular doctrine (e.g. standing, jurisdiction, mootness, justiciability, the appointment of judges, etc.).

Your Final Paper should have an introduction which sets out why the topic you have chosen is relevant and how you propose to analyze the topic in your paper. Your paper should have a brief conclusion.

Your Final Paper will be evaluated based on the following criteria:

- Topic Selection – Why have you chosen this topic? Explanation of its relevance / importance.
- Analysis – Quality and depth of analysis. Is your paper analytical or does it merely spend time describing the topic, based on the work of others?
- Structure, organization and writing quality – Does the structure of your paper make sense for the reader? Is it easy to follow? Is your paper well-written? Have you (and someone else) proofread it for typos and for clarity?
- Quality of Research
- Ambition, creativity and originality

IV. COURSE MATERIALS

Adam Dodek, *The Canadian Constitution* (Toronto: Dundurn, 2013).

V. REFERENCES

Supreme Court of Canada Website <http://www.scc-csc.gc.ca>

Bibliography of the Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/biblio/index-eng.asp>

Decisions of the Supreme Court of Canada <http://scc.lexum.org/en/index.html> or <http://www.canlii.org>

The Court – <http://www.thecourt.ca>

VI. COURSE OUTLINE

I. COURSE INTRODUCTION AND OVERVIEW

SCC Website, “About the Court”, <http://www.scc-csc.gc.ca/court-cour/role/index-eng.asp>

Dodek, *The Canadian Constitution*, pp. 13-35

II. THE HISTORY OF THE SUPREME COURT OF CANADA

Dodek, *The Canadian Constitution*, 119-126.

Reference re BNA 1867, s 24, [1928] SCJ No 19, [1928] SCR 276, [1928] 4 DLR 98

Edwards v. Attorney-General for Canada, [1930] AC 124 (PC).

III. THE SUPREME COURT OF CANADA: STRUCTURE, PEOPLE & JURISDICTION

A. CONSTITUTIONAL FRAMEWORK, JURISDICTION & COMPOSITION

Constitution Act, 1867, ss. 96-101, online: http://laws-lois.justice.gc.ca/eng/Const/page-6.html#anchorbo-ga:s_96.

Supreme Court Act, RSC 1985, c S-26, ss. 3-10, ss. 35-55, online: <http://laws-lois.justice.gc.ca/eng/acts/S-26/FullText.html>

Department of Justice, “Minister of Justice Announces Members of the Supreme Court of Canada Selection Panel”, 11 June 2013, online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32908.html

Statement from the Prime Minister on the Retirement of Justice Fish, 23 April 2013, online: <http://pm.gc.ca/eng/media.asp?category=3&featureId=6&pageId=49&id=5441>.

Dodek, *The Canadian Constitution*, pp. 119-125.

B. REFERENCES

Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698, available online at: <http://scc.lexum.umontreal.ca/en/2004/2004scc79/2004scc79.html>

IV. WHAT IS THE CONSTITUTION OF CANADA?

A. THE WRITTEN AND UNWRITTEN CONSTITUTION

Dodek, *The Canadian Constitution*, pp. 17-18.

Constitution Act, 1982, s. 52 & Schedule, online: <http://laws-lois.justice.gc.ca/eng/CONST/page-16.html#docCont>

Patriation Reference, [1981] 1 S.C.R. 753.

Secession Reference, [1998] 2 S.C.R. 217.

B. The “Canadian Constitutional Model”

Constitution Act, 1982, ss. 1-34 (“The Charter”).

Dodek, “Canada as Constitutional Exporter: The Rise of the ‘Canadian Model’ of Constitutionalism”, (2007) 36 *Supreme Court Law Review* (2nd) 309, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1062361

V. Topics in Canadian Constitutional Law

A. Fundamental Freedoms: Expression

Hate Speech

R. v. Keegstra, [1990] 3 S.C.R. 697.

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11.

Pornography

R. v. Butler, [1992] 1 S.C.R. 452.

R. v. Sharpe, 2001 SCC 2, [2001] 1 S.C.R. 45.

B. Fundamental Freedoms: Religion

Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256.

Syndicat Northcrest v. Amselem, 2004 SCC 47, [2004] 2 S.C.R. 551.

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567.

C. Equality

Andrews v. Law Society of British Columbia, [1989] 1 SCR 143.

Vriend v. Alberta, [1998]

Auton (Guardian ad litem of) v. British Columbia (Attorney General), 2004 SCC 78.

D. Liberty

The Scope of “Life, Liberty and Security of the Person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.

Reference re BC Motor Vehicle Act, [1985] 2 S.C.R. 486.

Liberty, Security of the Person and Abortion

R. v. Morgentaler, [1988] 1 S.C.R. 30.

Fundamental Rights

B. (R.) v. Children’s Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

The Rejection of Dignity

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44.

E. Judicial Independence

The Provincial Judges Reference, [1997] 3 S.C.R. 3.

VI. Issues in Constitutional Decision Making at the Supreme Court of Canada

Constitution Act, 1982, s. 52, online: <http://laws-lois.justice.gc.ca/eng/CONST/page-16.html#docCont>

Peter W. Hogg & Alison Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75.

F.L. Morton, “Dialogue or Monologue?” in Paul Howe & Peter H. Russell, *Judicial Power and Canadian Democracy* (Montreal & Kingston: McGill-Queen’s University Press, 2001) 111-117

Vriend v. Alberta, [1998] SCJ No 29, [1998] 1 SCR 493 at paras 137-39, 178.