Federation of Law Societies of Canada

NCA National Committee on Accreditation

Syllabus
Canadian Constitution Law

Revised for January 2023

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.

SCOPE OF THE SUBJECT

Constitutional law is distinguished by what it does (it creates the principal 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 the readings assigned in this syllabus is to provide candidates with an introduction to the various components of Canadian constitutional law, and to the principles necessary for understanding and applying the provisions of the Canadian constitution in legal practice.

The assigned readings begin, in Part I, with an introduction to the nature and sources of the Canadian constitution, followed by an overview of the procedures for amending the constitution.

In Part II, the readings explore the distribution of legislative powers in sections 91-95 of the *Constitution Act, 1867*. The readings here begin with an introduction to the federal nature of the Canadian state, the resulting distribution of legislative powers to federal and provincial legislative bodies, the role of the judiciary in upholding this distribution of powers, and general principles of constitutional interpretation applied by the courts in discharging this role. The readings then turn to a detailed study of some of the most important legislative powers, including the provincial power in relation to “property and civil rights in the province” [s.92(13)], as well as the federal powers in relation to “peace, order, and good government” [opening language of s.91], “trade and commerce” [s.91(2)], and “criminal law” [s.91(27)]. Finally, a number of doctrines addressing the potential for overlap of federal and provincial exercises of legislative power are examined.

Part III examines distinct constitutional protections of the rights of Indigenous peoples. The readings here focus on the range of “aboriginal and treaty rights” entrenched in s.35 of the *Constitution Act, 1982*, including Aboriginal rights, Aboriginal title, treaty rights, and the Crown’s duty to consult.

Part IV of the syllabus then turns to the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* (*Charter*), beginning with an examination of principles of *Charter* interpretation, the scope of application of the *Charter* [s.32], and the possibility of legislative override of certain rights and freedoms [s.33]. The readings then focus on four of the most important rights-protecting provisions of the *Charter* – those relating to 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 [s.15]. Part IV concludes with an examination of justifiable limits on rights [s.1] and remedies for *Charter* violations [ss.24, 52].

EXAMINATION

The examination for this subject will be a three-hour open book examination. The examination 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 a candidate's ability to identify constitutional issues, accurately state the applicable legal rules, apply those rules to hypothetical situations, cite relevant case law, and draw conclusions supported by analysis. In other words, problem questions require the exercise of independent judgment grounded in the *application* of constitutional rules to specific fact situations. As a result, when responding to problem questions, candidates are strongly discouraged from copying out prepared study notes, most particularly "boilerplate" or "canned" answer scripts. Such materials are readily recognizable, often contain erroneous or outdated descriptions of the law, and rarely demonstrate anything other than a candidate's ability to transcribe text – a skill *not* being tested on an open-book examination. While succinct statements of the governing rules, preferably in the candidate's own words or those of the leading cases, can be useful, candidates should focus their answers on *applying* those rules to the *specific* facts of the question in order to reach legal conclusions that are supported by legal *analysis*. For candidates who lack experience answering problem examination questions, familiarization 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 examinations on file. In addition, many Canadian law schools make examinations available online and some Canadian constitutional law professors have course websites with sample examinations and model answers.

Short answer questions, which may be in a true/false or multiple-choice format, test candidates' ability to succinctly and correctly evaluate statements about the content of Canadian constitutional law, as in the following example:

> Question: Indicate whether the following statement is true or false, and cite the case listed on the syllabus that best supports your answer: Pursuant to the "general regulation of trade" branch of its power to enact laws in relation to trade and commerce in s.91(2) of the *Constitution Act, 1867*, Parliament may enact a comprehensive regulatory scheme aimed at promoting fair competition in intraprovincial and interprovincial trade.
>
> Answer: True. Relevant case listed on the syllabus: *General Motors v City National Leasing*.

Short essay questions test whether candidates have critically engaged with the material listed in the syllabus, have started to form their own opinions about the strengths and weaknesses of Canadian constitutional law, and are able to articulate and defend those opinions (e.g.: "Would you favour the repeal of s.33 of the *Canadian Charter of Rights and Freedoms*?"). In answering essay questions, candidates should avoid lengthy descriptive material and focus rather on building a legal argument that directly addresses the specific issue identified in the question and that is supported by (duly acknowledged) authority covered in the syllabus.

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 a few from other courts), 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 textbook is referred to below as "Hogg").

The case law you are required to read is accessible online at http://scc.lexum.org (for Supreme Court of Canada judgments), or at http://www.bailii.org/uk/cases/UKPC/ (for Privy Council rulings). Hyperlinks are provided to all of the cases listed in the required readings below. You may also access the full text of all court rulings listed below in case reporters in law libraries – for example, Supreme Court of Canada rulings are reported in the Canadian Supreme Court Reports (SCR).

Candidates should acquire a copy of the most recently published student edition of the Hogg textbook. The student edition contains all of the chapters included in the required readings below. The Hogg textbook is also available in law libraries in a loose-leaf format updated annually. Candidates are advised to use the most recent student edition of the Hogg textbook (or the loose-leaf version) when completing the readings below, because it will contain the most up-to-date analysis of recent developments.

Candidates should make regular reference to the texts of Canadian constitutional documents relevant to the topics covered in this syllabus, especially the provisions of the *Constitution Act*, *1867* and the *Constitution Act, 1982* that are included in 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 Act, 1867* and *Constitution Act, 1982* can also be found on the Department of Justice website at http://laws-lois.justice.gc.ca/eng/Const/index.html and on the website of the Canadian Legal Information Institute at http://www.canlii.org. Hyperlinks are provided to all of the provisions of the *Constitution Act*, *1867* and the *Constitution Act, 1982* that are included in the list of required readings below.

Candidates should aim to develop an understanding of the principles of Canadian constitutional law that starts with the text of the *Constitution Acts* and is then deepened and extended by the principles developed in the leading cases listed in this syllabus. In light of the sparse language of the constitutional text, the bulk of Canadian constitutional law is the product of judicial interpretation. The Hogg textbook should serve to provide historical context and clear summaries of the law. However, candidates are warned against focusing their study exclusively on the readings in the Hogg textbook. While the Hogg textbook is a useful resource, it is important to study the constitutional provisions and leading judicial decisions themselves. The assigned cases set out authoritative statements of the content of Canadian constitutional law. The law cannot be derived from a study of the text of the *Constitution Acts* and the Hogg textbook alone. Candidates should also be alert to instances where the views expressed in the Hogg textbook are at odds with judicial opinions or are

incomplete because the textbook has not yet been updated to reflect the latest judicial rulings listed on the syllabus.

The examination will test knowledge derived from all three sources – from the constitutional provisions themselves, from the case law, and from the Hogg textbook. An adequate understanding of and capacity to work with Canadian constitutional law requires a knowledge base that is a combination of the constitutional text, the case law and scholarly analysis.

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TOPICS TO BE COVERED AND REQUIRED READINGS

The outline that follows gives the full list of readings required to prepare for the examination in this subject. All of the required readings are examinable. As described above, the reading list is divided into four parts: basic concepts, distribution of legislative powers, the rights of Indigenous peoples, and Charter rights and freedoms.

The references to the chapters in the Hogg textbook below use the chapter numbers from the latest student edition.

PART 1: BASIC CONCEPTS

1. Sources and Nature of the Constitution

Hogg, chapter 1, “Sources”
Reference re Secession of Quebec, [1998] 2 SCR 217

2. Amending Procedures

Constitution Act, 1982, Part V, ss 38-49
Hogg, chapter 4, “Amendment”, and chapter 5.7, “Secession”

PART 2: DISTRIBUTION OF LEGISLATIVE POWERS

3. Federalism

Constitution Act, 1867, ss 91-95
Hogg, chapter 5, "Federalism"

4. Judicial Review and Principles of Interpretation

Constitution Act, 1982, s 52
Hogg, chapter 15, "Judicial Review on Federal Grounds"
R v Morgentaler, [1993] 3 SCR 463
Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3

5. Property and Civil Rights

Constitution Act, 1867, s 92(13)
Hogg, chapter 21, "Property and Civil Rights"
Citizens Insurance Company of Canada v Parsons, (1881) 7 AC 96 (PC)
Chatterjee v Ontario (Attorney General), 2009 SCC 19, [2009] 1 SCR 624
Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837

6. Trade and Commerce

Constitution Act, 1867, s 91(2)
Hogg, chapter 20, "Trade and Commerce"
General Motors of Canada Ltd. v City National Leasing, [1989] 1 SCR 641
Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837

7. 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 SCR 373
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11

8. Criminal Law

Constitution Act, 1867, s 91(27), s 92(15)
Hogg, chapter 18, "Criminal Law"
Reference re Validity of Section 5 (a) Dairy Industry Act, [1949] SCR 1
Reference re Firearms Act (Can.), [2000] 1 SCR 783
Reference re Genetic Non-Discrimination Act, 2020 SCC 17

9. Ancillary Powers

General Motors of Canada Ltd. v City National Leasing, [1989] 1 SCR 641
Quebec (Attorney General) v Lacombe, 2010 SCC 38, [2010] 2 SCR 453

10. Paramountcy

Hogg, chapter 16, "Paramountcy"
Rothmans, Benson & Hedges Inc. v Saskatchewan, 2005 SCC 13, [2005] 1 SCR 188

11. Interjurisdictional Immunity

Hogg, chapter 15.8, "Interjurisdictional Immunity"
Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3
Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 SCR 536

PART 3: ABORIGINAL RIGHTS AND THE CONSTITUTION

12. Introduction

Constitution Act, 1982, s 25, s 35
Hogg, chapter 28, "Aboriginal Peoples"

13. Aboriginal Rights

R v Sparrow, [1990] 1 SCR 1075
R v Van der Peet, [1996] 2 SCR 507, per Lamer CJ, paragraphs 1-94
R v Powley, 2003 SCC 43, [2003] 2 SCR 207

14. Aboriginal Title

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 256

15. Treaty Rights

R v Marshall, [1999] 3 SCR 456

16. Duty to Consult

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511

PART 4: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

17. Interpreting the *Canadian Charter of Rights and Freedoms*

Hogg, chapter 36, "Charter of Rights"

18. Application of the *Canadian Charter of Rights and Freedoms*

Constitution Act, 1982, s 32
Hogg, chapter 37, "Application of Charter"
Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, paragraphs 19-52
Greater Vancouver Transportation Authority v Canadian Federation of Students, 2009 SCR 31, [2009] 2 SCR 295, paragraphs 13-24

19. Override of Rights

Constitution Act, 1982, s 33
Hogg, chapter 39, "Override of Rights"
Ford v Quebec (Attorney General), [1988] 2 SCR 712, Part V of the Court's opinion, paragraphs 23-36

20. Freedom of Conscience and Religion

Constitution Act, 1982, s 2(a)

Hogg, chapter 42, "Religion"
Syndicat Northcrest v Amselem, 2004 SCC 47, [2004] 2 SCR 551, per Iacobucci J, paragraphs 1-104
Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698, paragraphs 47-60
Mouvement laïque québécois v Saguenay (City), 2015 SCC 16, [2015] 2 SCR 3

21. Freedom of Expression

Constitution Act, 1982, s 2(b)
Hogg, chapter 43, "Expression"
Irwin Toy Ltd. v Quebec (Attorney General), [1989] 1 SCR 927 Parts I, VI, and VII of the majority opinion
Montréal (City) v 2952-1366 Québec Inc., 2005 SCC 62, [2005] 3 SCR 141
Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11, [2013] 1 SCR 467

22. Life, Liberty and Security of the Person

Constitution Act, 1982, s 7
Hogg, chapter 47, "Fundamental Justice"
Canada v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134
Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101
Carter v Canada, 2015 SCC 5, [2015] 1 SCR 331

23. Equality Rights

Constitution Act, 1982, s 15
Hogg, chapter 55, "Equality"
Andrews v Law Society of British Columbia, [1989] 1 SCR 143
R v Kapp, 2008 SCC 41, [2008] 2 SCR 483
Fraser v Canada, 2020 SCC 28

24. Limitation of Rights

Constitution Act, 1982, s 1
Hogg, chapter 38, "Limitation of Rights"
R v Oakes, [1986] 1 SCR 103, per Dickson CJ, Part V of his opinion, paragraphs 62-79
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567

25. Remedies

Constitution Act, 1982, s 24, s 52
Hogg, chapter 40, "Enforcement of Rights"
Vriend v Alberta, [1998] 1 SCR 493, per Iacobucci J, paragraphs 129-179
Vancouver (City) v Ward, 2010 SCC 27, [2010] 2 SCR 28
Ontario (Attorney General) v G, 2020 SCC 38

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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (**www.canlii.org**). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

Your exam registration fee also includes free access to the Advance Quicklaw resources of LexisNexis. Your ID and password will be arranged and emailed to your email address on file a few weeks after the end of the registration session.

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