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<b>COURSE:</b>		<b>LAWS 3500 A – Constitutional Law</b>
<b>TERM:</b>		<b>Winter 2021</b>
<b>PREREQUISITES:</b>		<b>LAWS 2501 or PSCI 2003 and 0.5 credit in LAWS at the 2000 level</b>
<b>CLASS:</b>	<b>Day &amp; Time:</b>	<b>This class will have a hybrid of asynchronous and synchronous lectures. Synchronous lectures will be held via Big Blue Button on Mondays in the 6:05pm-8:55pm time slot.</b>
	<b>Room:</b>	<b>Each week, there will be a Big Blue Button room posted on the LAWS 3500 CuLearn page for the synchronous lecture.</b>
<b>INSTRUCTOR:</b>		<b>Jennifer S. Bond</b>
<b>TEACHING ASSISTANT:</b>		<b>Liam Pepper (email: <a href="mailto:liampepper@carleton.ca">liampepper@carleton.ca</a>)</b>
<b>CONTACT:</b>	<b>Office Hrs:</b>	<b>By appointment, either in the office hours Big Blue Button room set up on the CuLearn page for LAWS 3500, or by other agreed upon method.</b>
	<b>Telephone:</b>	<b>613-670-6335</b>
	<b>Email:</b>	<b><a href="mailto:jennifers.bond@carleton.ca">jennifers.bond@carleton.ca</a></b>

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### **CALENDAR COURSE DESCRIPTION**

An investigation of the Canadian constitution. Sovereignty, the nature and units of executive, legislative, and judicial power in Canada as interpreted by the courts. The distribution of powers under the Canadian constitution, including an investigation of contemporary problems of federalism. Problems of judicial review.

### **COURSE DESCRIPTION**

This course builds on prior classes where the history of the Constitution has been introduced, and dives deeper into the legal principles that underlie the interpretation of the Canadian Constitution. We will examine themes of Canadian federalism, including cooperative federalism; the separation of powers and judicial interpretation; concepts of

equality in the *Charter*, and emerging issues in the relationship between the Constitution and Indigenous law.

The first part of the class will explore the *Constitution Act, 1867*, the division of powers and how the courts determine the pith and substance of legislation, and the application of the POGG doctrine to recent events. We will also study the role of unwritten constitutional conventions, and the differences between how they are interpreted, adjudicated, and enforced versus written constitutional provisions.

The second part of the class will examine the circumstances that lead to the patriation of the Constitution, and the creation of the *Constitution Act, 1982*. There will be a review of the rights afforded in the *Canadian Charter of Rights and Freedoms*, what limits the state can impose on those rights, and how those limits must be justified. This will include looking at the notwithstanding clause, and recent examples of its use (or proposed use). We will also examine the relationship between Indigenous people and the Constitution, and constitutional issues on the horizon.

Students in this course will be encouraged to engage with the Constitution, and its judicial interpretation, critically. In addition to being the supreme law of Canada, the Constitution is, at its core, an agreement between the state and its people. It is a mutable document, and while difficult to amend, is not written in stone. Students will be asked to examine the role of the courts in the interpretation of the Constitution, and the ensuing “dialogue” between the judicial, executive, and legislative branches and form their own opinions on how effective that dialogue is in upholding the rights and responsibilities enshrined in the Constitution.

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

1. Explain how the Constitution interacts with the three branches of government;
2. Explain the written and unwritten provisions of the Canadian Constitution;
3. Identify the types of rights contained in the *Canadian Charter of Rights and Freedoms*, and how the courts have interpreted the content of those rights;
4. Read cases, identify ratios, and engage in critical evaluation of judicial analysis.

### **ONLINE COURSE DELIVERY**

This course is taught with a hybrid of synchronous and asynchronous lectures. Asynchronous lectures will be posted under the appropriate week on the CuLearn site for the class.

Students are encouraged to complete the assigned readings and watch the asynchronous lectures before the synchronous lecture for that week (there are no assigned readings for the Introduction Week).

## **REQUIRED TEXTS**

There is one required textbook for this course:

*Constitutional law*, Monahan, Patrick, Shaw, Byron, Ryan, Padraic, 2017 5<sup>th</sup> ed. Irwin Law

All other required readings will be available on CuLearn or Ares. Please make sure to check the CuLearn page each week to ensure that you have all of the readings for the week.

The textbook is available for purchase at the Carleton University Bookstore, including through its website <https://www.bkstr.com/carletonstore/home>. Students may also choose to purchase an e-version of the book through online book sellers, or the publisher Irwin Law.

## **SUPPLEMENTARY TEXTS**

From time to time, the CuLearn page will have a list of optional readings, or other media (such as videos, podcast episodes, etc) for the week. While these are not mandatory, students are encouraged to engage with this material as a supplement to the assigned readings.

## **EVALUATION**

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.

### **Class participation – 15%**

The synchronous lectures will be a time to collaborate and discuss the issues and concepts arising from the assigned readings. Students' class participation will be graded both on attendance in class, as well as contributions to discussions. Please remember to be mindful and respectful of others. Disrespectful language, or comments, towards other students or the instructor will not be tolerated.

For those without access to a laptop/computer, reliable internet, or otherwise will likely miss most (50% or more), if not all, synchronous lectures, you should let me know as soon as possible so that we can create an alternative way for you to earn attendance/participation marks.

**Case Comment – 35% (due March 26, 2020)**

Students will choose from a list of Constitution related Supreme Court of Canada decisions, and will be required to prepare a case comment of no more than five (5) double spaced pages in 12 pt Times New Roman font. The case comment should adopt the following format

- Case name and citation – also known as the style of cause
- Facts – a succinct overview of the relevant facts of the case
- Procedural history – a succinct review of the lower court holdings
- Issues – identification of the main issues that the court was called upon to decide
- Decision – a sentence or two on the ultimate decision of the court and the remedy ordered
- Ratio - The ratio decidendi identifies what is important about a case from a legal perspective and also what effect it might have on society. Think of this as your “elevator explanation” of the important aspect of the case – what is the important takeaway about this case from a Constitutional perspective?
- Reasons – An explanation of how the Court reached its decision, including how it interpreted the Constitutional provisions at issue and what principles it applied.

Case comments should be properly cited with footnotes to the appropriate paragraph or page of the decision that is being referenced.

The assignment will be discussed further in class. The list of Supreme Court of Canada cases to choose from will be posted on CuLearn during the first week of classes.

**Assignments are to be submitted by 5:00pm ET on March 26, 2020 on the Dropbox on the LAWS 3500 CuLearn page.** Late assignments will incur a 2% penalty a day, unless previous arrangements have been made with the instructor.

**Take Home Final Exam – 50% (to be scheduled during the formal exam period)**

A take home final exam will be posted on CuLearn during the first week of the exam period (date to be provided).

The exam will consist of a number of short answer questions. Further details will be discussed in class, well before the exam is provided.

## **LATE PENALTIES AND REQUESTS FOR EXTENSIONS**

The granting of extensions is determined by the instructor who will confirm whether an extension is granted and the length of the extension. For requests for extensions lasting less than 7 days, please complete the form at the following link and submit it to the instructor prior to the assignment due date: <https://carleton.ca/registrar/wp-content/uploads/self-declaration.pdf>.

**Extensions for longer than 7 days will normally not be granted.** In those extraordinary cases where extensions lasting longer than 7 days are granted, the student will be required to provide additional information to justify the longer extension (up to a maximum of 14 days). **Please contact the instructor as soon as possible if you require an extension of longer than 7 days.**

## **SCHEDULE**

<b>DATE</b>	<b>CLASS SCHEDULE</b>
Jan 11	<p><b>The Framework and Institutions</b></p> <ul style="list-style-type: none"> <li>• Representative and Responsible Government</li> <li>• The Constitutional Negotiations of 1864-1867</li> </ul> <p><b>The Separation of Powers</b></p> <ul style="list-style-type: none"> <li>• Executive, legislative, and judicial branches of government</li> </ul> <p><b>Parliamentary supremacy</b></p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>• <i>Constitution Act</i>, 1867</li> <li>• Department of Justice, <i>Canada's System of Justice</i>, pp. 1-6, 9-20</li> <li>• Department of Justice, <i>Canada's Court System</i>, pp. 1-12</li> <li>• Monahan Chapters 2&amp;3</li> </ul>
Jan 18	<p><b><i>Constitution Act, 1867</i></b></p> <ul style="list-style-type: none"> <li>• Federalism and the Division of Powers - section 91 and section 92</li> <li>• Delegation of authorities under the Constitution</li> <li>• POGG power – then and now</li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>• <i>Constitution Act, 1867</i>, sections 91, 92, 94.</li> <li>• Monahan Ch 4 (Division of powers) &amp; Ch 8 (POGG)</li> <li>• Corrine Tansowny, "What is the Matter? The Appeal Courts' Error in Characterizing the Greenhouse Gas Pollution Pricing Act," September 23, 2020, Thecourt.ca <a href="http://www.thecourt.ca/what-is-the-matter-the-appeal-courts-error-in-characterizing-the-greenhouse-gas-pollution-pricing-act/">http://www.thecourt.ca/what-is-the-matter-the-appeal-courts-error-in-characterizing-the-greenhouse-gas-pollution-pricing-act/</a></li> </ul>

Jan 25	<p><b>Constitution Act, 1867 cont'd</b></p> <ul style="list-style-type: none"> <li>• Federalism and the division of powers cont'd - From Watertight compartments to Shared Responsibility</li> <li>• Pith and substance analysis in action</li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>• Ch 7 Mohanan</li> <li>• <i>Reference re Genetic Non-Discrimination Act</i>, 2020 SCC 17</li> <li>• <i>Ward v. Canada (Attorney General)</i>, 2002 SCC 17</li> </ul>
Feb 1	<p><b>Cooperative Federalism and the Constitution</b></p> <ul style="list-style-type: none"> <li>• What is cooperative federalism?</li> <li>• Judicial interpretation of cooperative federalism</li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>• Monahan, Ch 9</li> <li>• Adams, Eric M.. "Judging the Limits of Cooperative Federalism." <i>The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference</i> 76 (2016)</li> </ul>
Feb 8	<p><b>Constitutional principles and unwritten constitutional conventions</b></p> <ul style="list-style-type: none"> <li>• Living tree doctrine</li> <li>• Constitutional principles</li> <li>• Examples of unwritten constitutional conventions</li> <li>• Enforcement of contraventions of unwritten constitutional conventions</li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>• <i>Edwards v. Attorney General of Canada</i>, [1930], A.C. 124, [1929] UKPC 86 ("The Persons Case")</li> <li>• <i>Reference re Secession of Quebec</i>, [1998] 2 S.C.R. 217 (<u>Read only</u>: Headnote; paras 38-105)</li> <li>• Monahan Ch 1</li> <li>• Beverly McLachlin, P.C, <i>Unwritten Constitutional Principles: What is Going On?</i>, Given at the 2005 Lord Cooke Lecture in Wellington, New Zealand December 1<sup>st</sup>, 2005. <a href="https://www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx">https://www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx</a></li> <li>• Lady Hale's summary of the UKSC Prorogation decision</li> </ul>
<b>READING WEEK FEB 15-19 – NO CLASSES</b>	
Feb 22	<p><b>Constitution Act, 1982</b></p> <ul style="list-style-type: none"> <li>• History and creation of the <i>Constitution Act</i>, 1982 <ul style="list-style-type: none"> <li>◦ The <i>Patriation Reference</i></li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ The “Night of the Long Knives”</li> <li>● Amending formula</li> <li>● Intro to <i>Canadian Charter of Rights and Freedoms</i></li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>● <i>Constitution Act, 1982</i></li> <li>● Monahan pp. 184-186</li> <li>● Ch 13 Monahan</li> <li>● Mathen, Carissima. "The question calls for an answer, and I propose to answer it": The Patriation Reference as Constitutional Method." <i>The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference</i> 54. (2011) <a href="http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/6">http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/6</a></li> </ul>
March 1	<p><b>Canadian Charter of Rights and Freedoms</b></p> <ul style="list-style-type: none"> <li>● Sections 2 to 6</li> <li>● Distinguishing between individual and collective rights</li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>● <i>Constitution Act, 1982</i>, ss.2-6</li> <li>● Monahan, Ch. 13</li> </ul>
March 8	<p><b>Canadian Charter of Rights and Freedoms cont'd</b></p> <ul style="list-style-type: none"> <li>● Sections 7-11, 15, 23</li> <li>● Formal versus substantive equality</li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>● <i>Constitution Act, 1982</i>, ss. 7-11, 15, 23</li> <li>● Monahan Ch 14</li> <li>● <i>Canada v Bedford</i>, 2013 SCC 72 (read headnote only)</li> <li>● <i>Fraser v Canada</i>, 2020 SCC 28</li> </ul>
March 15	<p><b>Canadian Charter of Rights and Freedoms cont'd</b></p> <ul style="list-style-type: none"> <li>● Section 1 <ul style="list-style-type: none"> <li>○ The <i>Oakes</i> test</li> <li>○ Evidence under section 1</li> </ul> </li> <li>● Section 33 <ul style="list-style-type: none"> <li>○ Review of the initial reasons for section 33</li> <li>○ Recent examples of the use, or almost use, of section 33</li> </ul> </li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>● Department of Justice, “Section 1,” <i>Charterpedia</i> <a href="https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/checked/art1.html">https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/checked/art1.html</a></li> </ul>

	<ul style="list-style-type: none"> <li>Centre for Constitutional Studies, <i>Section 33</i>, <a href="https://ualawccsprod.srv.ualberta.ca/2019/07/notwithstanding-clause/">https://ualawccsprod.srv.ualberta.ca/2019/07/notwithstanding-clause/</a></li> </ul>
March 22	<p><b>Indigenous peoples and the constitution</b></p> <ul style="list-style-type: none"> <li>The nature of indigenous rights</li> <li>Constitutional status of Indigenous rights prior to, and after, 1982</li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>Monahan, Ch. 15</li> </ul>
March 29	<p><b>Indigenous peoples and the constitution</b></p> <ul style="list-style-type: none"> <li>Applying the Living Tree doctrine to the evaluation of Indigenous rights</li> </ul> <p><u>Readings</u></p> <ul style="list-style-type: none"> <li>Monahan, Ch. 15</li> <li>John Burrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism," <i>The Canadian Historical Review</i>, Volume 98, Number 1, March 2017, pp.114-135</li> <li><i>Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)</i>, 2017 SCC 54</li> </ul>
April 5	<p><b>The Canadian Constitution in the 21<sup>st</sup> Century</b></p> <ul style="list-style-type: none"> <li>Looking forward to emerging constitutional issues</li> </ul> <p><u>Readings:</u></p> <ul style="list-style-type: none"> <li>Monahan, Ch 16</li> </ul>
April 12	<p><b>Review class</b></p> <p><i>No readings</i></p>

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## **ACADEMIC ACCOMMODATIONS**

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

<https://carleton.ca/equity/wp-content/uploads/Student-Guide-to-Academic-Accommodation.pdf>

### **Pregnancy obligation**

Please contact 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 Department of Equity and Inclusive Communities (EIC):

<https://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 Department of Equity and Inclusive Communities (EIC):

<https://carleton.ca/equity/>

**Academic Accommodations for Students with Disabilities**

If you have a documented disability requiring academic accommodations in this course, please contact The Paul Menton Centre (PMC) at 613-520-6608 or [pmc@carleton.ca](mailto: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 as soon as possible to ensure accommodation arrangements are made. Please consult the PMC Website for their deadline to request accommodations for the formally-scheduled exam (if applicable) <https://carleton.ca/pmc>

**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: <https://carleton.ca/registrar/academic-integrity/>

**Survivors of Sexual Violence**

As a community, Carleton University is committed to maintaining a positive learning, working and living environment where sexual violence will not be tolerated, and survivors are supported through academic accommodations as per Carleton's Sexual Violence Policy. For more information about the services available at the university and to obtain information about sexual violence and/or support, visit:

<https://carleton.ca/studentssupport/svpolicy/>

**Accommodation for Student Activities**

Carleton University recognizes the substantial benefits, both to the individual student and for the university, that result from a student participating in activities beyond the classroom experience. Reasonable accommodation must be provided to students who

compete or perform at the national or international level. Please contact your instructor 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.

<https://carleton.ca/senate/wp-content/uploads/Accommodation-for-Student-Activities-1.pdf>

For more information on academic accommodation, please contact the departmental administrator or visit: <https://students.carleton.ca/services/accommodation/>

### **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: <https://carleton.ca/law/current-students/>