

**CONSTITUTIONAL LAW**  
**Law 100 – Section A01**  
**2014-2015**

**Faculty of Law, University of Victoria**  
**Professor Gillian Calder**

**Revised: January 11, 2015**

**I. Overview: Problem-based Learning**

*... a client's situation and needs do not come neatly categorized in compartments of contract, tort, common law, statutory law and so on. Real life problems require imagination, creativity and intellectual flexibility.<sup>1</sup>*

*[The case method] has been likened to teaching someone how to play music or a sport merely by studying how someone else plays without the opportunity to actually perform the activity itself.*

The methodology for this course has been substantially altered for 2014-2015. Instead of a more conventional Socratic/lecture approach assessed by 100% final examination, the methodology adopted in Legal Process of large group, small group, and embodied learning will be continued, and the course will be assessed by a series of group projects and written assignments.

And instead of pedagogy that introduces you to principles of law, and then gives you a hypothetical problem to apply those principles to in December and April for grading purposes, this course will begin by setting out a complex, social, economic and legal problem. We will learn more about this problem as the year unfolds while we work to understand this problem through the lens of constitutional law. This method will “offer enhanced opportunities to think critically about the potential of law to solve problems, both individual and systemic, by providing a practical context in which to evaluate and apply legal principles.”<sup>2</sup> Ultimately, we will work together with the goal of assessing what constitutional law offers us to effectively address complex social issues in law.

This year the “problem” the course will address is “the problem of prostitution.”

There is a deep literature on problem-based learning in critical pedagogy studies, but very few examples of how this methodology has been employed in law school in Canada, and in particular, in the first year curriculum.<sup>3</sup> If you are interested to know more about using problem-based learning in a law school setting please read:

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<sup>1</sup> Macfarlane and Manwaring at 277.

<sup>2</sup> *Ibid.* at 273.

<sup>3</sup> Special thanks to Ruthann Robson, Kate Sutherland and Sheila Wildeman for sharing resources and past experiences.

Julie Macfarlane and John Manwaring, “Using Problem-Based Learning to Teach First Year Contracts” (1998) 16(2) *Journal of Professional Legal Education* 271-298

Shirley Lung, “The Problem Method: No Simple Solution” (2009) 45(4) *Williamette Law Review* 723-766.

As with all pedagogies, this form of teaching will be more challenging for some than others. However, the goal is a more engaged, more dynamic, more student-centred approach to learning; one that aims to prompt you to “internalize habits of self-questioning” drawing on the written and the visual, using problems and feedback.<sup>4</sup> Due attention will be paid to the diverse learning styles of the class.

## II. What Kind of Evaluation fits with the Way you will Learn Constitutional Law?

*... the process of assessment should, ideally, itself provide a vehicle for student learning, something we often overlook in designing assessments which are ‘freeze frames’ of individual student abilities at that moment (generally at the very end of the course.)<sup>5</sup>*

There will not be exams in this course, this year. Instead you will be given a series of writing and project opportunities that will tie to the work that you have done, and give you multiple opportunities for practice, repetition, reinforcement and feedback. The goal is to have the evaluation be part of your learning process, part of developing the key skills of problem-solving and self-directed learning.

An additional skill necessary for effective legal advocacy is collaboration. Part of this year’s constitutional law evaluation will be based on group work. Details to be discussed as the term evolves.

Further details will be given on each assignment at an appropriate time, but essentially:

### 1. Fall Term (two components)

- group assignment, worth 25% of your fall term grade; responding to one of the fall’s guest speakers; details to be discussed in class  
**due: Monday, November 3, 2014 at 10:30 a.m. (Dropbox)**
- take-home assignment, worth 75% of your fall term grade; choice of assigned questions in memorandum format; details and questions to be discussed in class  
**due: Wednesday, December 10, 2014 at 3:00 p.m. in the assigned room**

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<sup>4</sup> Lung at 748.

<sup>5</sup> Macfarlane and Manwaring at 288.

## 2. Spring Term (three components)

- group assignment, worth 25% of your second term mark (self-selected groups of 2-6 people); annotated bibliography of 10-20 external sources for the final exam, discussed in class: Monday, February 16, 2015  
**due: Monday, March 9, 2015 (this date still has to be checked against other assignments).**
- take-home written assignment, worth 25% of your second term mark; choice of essay questions focused solely on the Indigenous Laws/Colonialism component of the course; collaboration permitted and encouraged in the preparation process, discussed in class: **Monday, January 19, 2015**  
**due: Friday, April 10, 2015, 3:30 - 4:00 p.m.**
- take-home written assignment, worth 50% of your second term mark; choice of one of three written legal advocacy formats for articulating a challenge to the *Protection of Communities and Exploited Persons Act*, using the *Canadian Charter of Rights and Freedoms*  
**due: Friday, April 10, 2015, 3:30 - 4:00 p.m.**

The three components of your spring assessment will count for 100% of your final mark unless your first term mark is higher, in which case the spring components will count for 70% of your final mark.

## III. The Spring Term

This syllabus is being updated on January 11, 2015 to include information about the Spring Term. The fall was dedicated to the question of what tools federalism and the division of powers bring to the legal advocate working on the issues related to the sex trade and the criminalization of prostitution in Canada. The spring term will be dedicated to two additional questions of the constitution's relevance to the "problem of prostitution." First, we will turn to the question of colonialism, learning the key jurisprudence that flows from s. 35 of the *Constitution Act, 1982* as well as interrogating the lived realities and on-going legacies of colonial/settler relations. We will specifically look at the legal strategies that arose through the #IdleNoMore movement in the winter of 2012-2013 to address intersecting questions of social marginalization inside and outside the law.

Finally, we will turn to the *Canadian Charter of Rights and Freedoms* with particular attention to ss. 2(b), 7 and 15, to consider the impact that rights claims and corresponding obligations have on the principles of constitutionalism and the rule of law that inform Canadian legal worlds today. And, we will return this learning full-circle to the place that we started this course – looking at *Bedford*. It is very likely that the *Protection of Communities and Exploited Persons Act* will be challenged in the courts as unconstitutional. We will conclude the year looking at the

various ways that this Act might be challenged using the *Charter*.

The methodology of the Spring term will be very similar to the fall. Each week will have assigned readings. Class methodology will be varied to incorporate the diverse learning styles of your classmates identified at the outset of the year. We will work to build your inventory of tools relevant to constitutional challenges using the *Constitution Act, 1982*. And, where helpful, a podcast will be used to supplement the learning of the class. The final five classes of the year will be structured to aid students in theorizing and finalizing the written assignments due on April 10, 2015.

### **III. Necessary bits of Information**

#### **1. How to find me:**

Office location: Fraser Building, Room 226  
 Office telephone: (250) 472-5247  
 E-mail address: [gcalder@uvic.ca](mailto:gcalder@uvic.ca)

I have an open door policy. If my door is open and I am in my office, you are more than welcome to drop by and ask a question. Please also feel free to call me at 472-5247, e-mail me at [gcalder@uvic.ca](mailto:gcalder@uvic.ca), or stop me in the hall at any time to talk about the course or to set an appointment time to meet. E-mail is probably the best means for setting a meeting time.

You can also iMessage me if that is easier: [gcalder@uvic.ca](mailto:gcalder@uvic.ca).

#### **2. How to find the syllabus, assigned readings, weekly changes:**

Class website: <http://coursespaces.uvic.ca/course/view.php?id=2539>

I will use CourseSpaces to post readings, assignments, and podcasts, as well as for course announcements.

I also use Twitter to share things that I find with my classes. If you are on Twitter, please follow me at: <https://twitter.com/gilliancalder>. Don't worry I won't follow you back! If you are not on Twitter, search the hashtag #Law100. If you purposefully avoid this form of social media, don't worry, anything vital will be brought forward to class.

#### **3. How to find the class:**

Spring: Mondays and Wednesdays, 10:30 – 12:00 – room 159

#### 4. The Assigned and Supplementary Materials

The reading outline, which will continue to evolve and change, indicates the reading for each week. If the reading is not from your required materials, then it will be provided to you either by handout, or by electronic link, as early in advance as possible, but likely the class before. And always where possible, posted to coursespaces.

For many classes there will also be a podcast. Based on principles drawn from recent work on “the flipped classroom” and inspiration from my friend and colleague, Kim Brooks (<https://twitter.com/SchulichLawDean>), where helpful, I will record a podcast to be listened to before the assigned class. Then, instead of repeating that information in lecture format during the class, class-time can be used to work with the key principles raised.

To watch a roundtable on “the flipped classroom” see: <http://www.youtube.com/watch?v=XJDa-b2YXnc>

##### a. Required Materials

The Constitutional Law Group, eds., *Canadian Constitutional Law* (Emond Montgomery, 2010) 4th edition, and supplements. Supplement is available at: <http://www.emp.ca/canadian-constitutional-law-4th-edition.html> (click on the Supplement Tab and choose Volume II).

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

##### b. Recommended Materials (on reserve)

Peter W. Hogg, *Constitutional Law of Canada, 5<sup>th</sup> Edition*

Peter W. Hogg, *Constitutional Law of Canada: 2014 Student Edition*

John Borrows, *Canada's Indigenous Constitution* (Toronto: U of T Press, 2010).

Amber Dawn, *How Poetry Saved My Life: A Hustler's Memoir* (Vancouver: Arsenal Pulp Press, 2013).

The Kino-nda-niimi Collective, *The Winter We Danced: Voices from the Past, the Future, and the Idle No More Movement* (Winnipeg: ARP Books, 2014).

Leslie Hall Pinder, *The Carriers of No* (2007) 31 *Legal Studies* 1113-1120.

A further list of recommended materials will be provided in class in support of writing assignments, and where possible all materials will be placed on reserve in the library, and/or posted to CourseSpaces.

##### c. Some Interesting Law Blogs and People to Follow in Twitter, if you do that kind of thing

[www.thecourt.ca](http://www.thecourt.ca)

<http://supremeadvocacy.ca/newsletter/>

<http://ifls.osgoode.yorku.ca>

<http://ablawg.ca>

<http://www.bloggingforequality.ca>

<http://bedfordsafehaveninitiative.com>

### **Interesting folk to follow on Twitter:**

**@dougwhite**

**@cmathen**

**@OsgoodeIFLS**

**@debraparkes**

**@ADodek**

**@LawSchoolTools**

**@ProfWetPaint**

**@ActuallyMetro**

**@pivotlegal**

**@bccla**

**@peersvictoria**

## **5. Classroom Climate**

An inclusive and respectful classroom environment is crucial to a positive learning experience. To ensure that all students feel welcome and able to participate in class discussions, particularly given the challenging nature of the constitutional questions we will address, we must strive to be inclusive in our use of language and examples, and the manner in which we engage with each other individually and as a group. The University and Faculty are committed to promoting, providing and protecting a positive, supportive and safe learning and working environment for all their members. We will need to work together to ensure that all aspects of this class live up to this commitment. If you have any concerns about the climate of the class, please bring those forward at anytime.

## **6. Mechanics, Regulations, Marking Matrices**

**a. Page length**

Where an assignment has a set page length, the following will need to be observed.

“Pages” mean letter-size (8 ½" x 11") paper, double-spaced, typed, with 12 point font and 1" margins. Students must use Times New Roman Font.

Any assignment that exceeds page limits will be docked five marks (approximately one grade level) for each partial page over the limit.

**b. Regulations**

- A. Students should obtain and review all regulations and policies contained in the University of Victoria Calendar, 2014-2015 (“U Vic Calendar”), both generally and specifically for the Faculty of Law.
- B. The assignments in this course will be open-book.
- C. All work on assignments must accord with the discussed principles on academic integrity. Individual assignments, for example, must be the original work of the student.
- D. Students are not permitted to record this class without the express permission of the instructor, or in the case of accommodation, the Associate Dean for Students.
- E. There will be no extensions permitted for the final assignments in this course, absent accommodation. A late examination, without accommodation, will be penalized one grade level (for example, A down to A-, B+ down to B) for each partial day past the due date.
- F. Academic integrity is expected of all participants in the University Community. **Please familiarize yourselves with the University’s Policy on Academic Integrity set out in the U Vic Calendar; and on-line at:**  
<http://web.uvic.ca/calendar2014-09/FACS/UnIn/UARe/PoAcI.html>
- G. The following breakdown of letters and percentages is the Faculty of Law uses to determine course grades:

<b>Faculty of Law – Grading Scale as of May 1, 2014</b>		
<b>Grade Point Value</b>	<b>Percentage Grade</b>	<b>Narrative Description</b>
9 8 7	90 – 100 (A+) 85 – 89 (A) 80 – 84 (A-)	Exceptional, outstanding and excellent performance, normally achieved by a minority of students. These grades indicate a student who is self-initiating, exceeds expectation and has an insightful grasp of the subject matter.
6 5 4	77 – 79 (B+) 73 – 76 (B) 70 – 72 (B-)	Very good, good and solid performance, normally achieved by the largest number of students. These grades indicate a good grasp of the subject matter or excellent grasp in one area balanced with satisfactory grasp in the other area.
3 2	65 – 69 (C+) 60 – 64 (C)	Satisfactory or minimally satisfactory performance. These grades indicate a satisfactory performance and knowledge of the subject matter.
1	50 – 59 (D)	Marginal Performance. A student receiving this grade demonstrates a superficial grasp of the subject matter.
N/A	COM	Complete (pass). Used only for 0-unit courses and those credit courses designated by the Senate. Such courses are identified in the course listings.
0	0 – 49 (F)	Unsatisfactory performance.
N/A	DEF	Deferred examination granted. Used only for courses in which a deferral of course work has been granted because of illness, or other circumstances.

**7. The Fall Term, December Assignment and Uniformity of Information to all First Year Students and Sections**

**a. The Fall Term and the Calculation of Final Grades**

The mark you receive in the Fall term (all assignments, group work and participation) is potentially worth 30% of your final grade for the course. However, it will count as 30% of the final grade in the course ONLY if it is higher than the mark that you receive for the Spring term. That is, if the grade for the Fall Term is lower than the mark you receive for the Spring term your



Fall term mark will not count and your Spring term mark will count for 100% of your final grade. This means that the fall group work and December assignment can help your final grade but cannot hurt it.

#### **IV. Thank yous**

Redesigning a course in the manner that this course has been revisioned has been informed and inspired by a whole lot of folk. Thank you to research assistants Dora Tsao, Jennifer Eshleman and James Parker for enthusiasm, ideas and support.

Thank you to my colleagues across the country Jennifer Koshan, Sonia Lawrence, Debra Parkes and Carissima Mathen, who have been a constant source of insight into critical pedagogy in constitutional law. Thank you to my UVic Law colleagues who have brainstormed with me as this idea for a move to problem-based learning has evolved with special thanks to Rebecca Johnson, Hester Lessard and Jeremy Webber. I am also grateful to my colleagues teaching the small group sessions in Constitutional Law this year, Kathy Chan and Patricia Cochran, their work on creating their own syllabi has been an important source of creativity for me.

Huge thanks to the guest speakers who have committed to come and talk to our class so far, Elin Sigurdson, Katrina Pacey, Kerry Porth, Kyle Kirkup, Kasari Govender and Joe Arvey, QC. The conversations that I have had with each of them this summer have proved invaluable.

Finally, thank you to 10 years of students at UVic Law, and a year of students at UNB Law, for their creativity, empathy and imagination, and their wide-eyed demand for more.

**Gillian Calder**  
**Associate Professor of Law**  
**January 11, 2015**

**Reading Outline – September 15, 2014**

**I. Introduction: The “Problem of Prostitution”**

**1. 15-Sep Introduction to Problem-based learning**

Assigned reading: none

In class methodology: video: <http://www.youtube.com/watch?v=fvKAVR75vMU>

Homework: VARK survey –

<http://www.vark-learn.com/english/page.asp?p=questionnaire>

**2. 17-Sep How is prostitution a constitutional issue?**

Assigned reading: PIVOT affidavit project:

[http://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/legacy\\_url/273/voicesfordignity.pdf?1345765612](http://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/legacy_url/273/voicesfordignity.pdf?1345765612)

In class methodology: small group work

Homework: peruse [www.pivotlegal.org](http://www.pivotlegal.org)

**3. 22-Sep “Everything I learned in Constitutional Law I learned from working on *Bedford* and *SWUAV*”**

Assigned reading: none

Guest speakers: Katrina Pacey and Kerry Porth

Podcast: Intro to: *Bedford*

**II. Division of Powers and the Question of Jurisdiction**

**4. 24-Sep How is prostitution a division of powers question?**

Assigned reading: *R. v. Westendorp*,

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1/index.do>

In-class methodology: small group work

Podcast: *R. v. Westendorp*

**5. 29-Sep Constitutionalism and the Rule of Law: Text and subtext**

Assigned reading: CLG pp. 1-27

In-class methodology: lecture

Podcast: The *Quebec Secession Reference and Unwritten Principles*

**6. 01-Oct Colonialism and the Myth of Terra Nullius**

Assigned reading: CLG pp. 63-77; Chapter one: *Canada's Indigenous Constitution*  
<http://faculty.law.ubc.ca/myoung/constitution/images/Canadas%20Indigenous%20Constitution%20-%20Ch%201%20Living%20Legal%20Traditions.pdf>

In-class methodology: story-telling exercise, lecture

Podcast: *Evangeline*

**7. 06-Oct Pith and Substance: Animating values and concepts of community**

Assigned reading: CLG pp. 199-235

In-class methodology: lecture

Podcast: *Morgentaler*

**8. 08-Oct Overlap and conflict: Legislating in an interdependent world**

Assigned reading: CLG pp. 241-249; 272-294; supplement pp. 27-31

In-class methodology: lecture

Podcast: The history of double aspect

**9. 15-Oct Validity in action**

Assigned reading: review

In-class methodology: (experiential) press conference

**10. 20-Oct Parliamentary Hearings on Bill C-36: Theories of Dialogue**

Assigned reading: Bill C-36: <http://openparliament.ca/bills/41-2/C-36/> (full text of Bill at Elsewhere tab)

In-class methodology: questioning of guest speaker

Video: <http://www.trudeaufoundation.ca/en/themes/publications/kyle-kirkup-bill-c-36>  
 (scroll down, presentation starts at 13:25)

**11. 22-Oct Interjurisdictional Immunity: Tensions, metaphors and cooperation**

Assigned reading: CLG pp. 265-272; Supplement pp. 32-43

In-class methodology: lecture

Podcast: Bell #1, Bell #2, *Tsilqhot'in*

**12. 27-Oct The Criminal Law Power: Federal "Evils"**

Assigned reading: CLG pp. 421-425; *AHRA* supplement pp. 61-81

In-class methodology: lecture  
Podcast: The form of the legislation

**13. 29-Oct ... and Provincial Morality**

Assigned reading: CLG pp. 451-462; reread *Westendorp*  
In-class methodology: small group work

**14. 03-Nov Peace, Order and Good Government: National concerns and emergencies**

Assigned reading: CLG pp. 295-335  
In-class methodology: (experiential) POGG in action  
Podcast: the history of the POGG power

**15. 05-Nov Trade and Commerce: Coordinate, not subordinate?**

Assigned reading: CLG pp. pp. 97-103; 356-358; supplement *Securities Reference* at pp. 51-59  
In-class methodology: lecture  
Podcast: The Egg Wars

**16. 10-Nov Division of Powers in Action: Argument, Intervention, Judgment**

Assigned reading: review CLG pp. 226-234  
In-class methodology: (experiential) federalism challenge  
Podcast: Maternity and parental leave

**III. Intervention and Standing: Who Gets a Voice?**

**17. 12-Nov SWUAV: Access to Justice and Marginalization**

Assigned reading: Full judgment: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10006/index.do>  
In-class methodology: small group work  
Podcast: Insights on *SWUAV*

**18. 17-Nov Centring Voices**

Assigned reading: excerpts from Amber Dawn, *How Poetry Saved My Life: A Hustler's Memoir* and selected facta  
In-class methodology: workshop

**19. 19-Nov The Challenge of Intervention**

Assigned reading: review *SWUAV*  
 Guest speaker: Kasari Govender

**20. 24-Nov Role of the Courts: Who are Judges?**

Assigned reading: CLG pp. 536-542; supplement at pp. 4-13  
 In-class methodology: small group work

**21. 26-Nov In-site: Pedagogies of Mapping**

Assigned reading: Excerpt from *PHS Society*: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7960/index.do>; excerpts from *Constitutional Forum*: [http://ejournals.library.ualberta.ca/index.php/constitutional\\_forum/issue/view/668/showToc](http://ejournals.library.ualberta.ca/index.php/constitutional_forum/issue/view/668/showToc)

In-class methodology: (experiential) using art to understand law  
 Podcast: Some thoughts on In-site

**22. 01-Dec Review**

**Outline for the spring term (to be revised and confirmed):**

**IV. *Bedford*, Bill C-36 and Dialogue: Who should get the final say?**

**23. 05-Jan *Bedford***

**24. 07-Jan Guest speaker: Elin Sigurdson**

**25. 12-Jan Dialogue**

**V. Colonialism: How are different communities differentially impacted by law?**

**26. 14-Jan Introduction to Indigenous Laws: Val Napoleon**

**27. 19-Jan Aboriginal Rights**

**28. 21-Jan *Tsilqhot'in***

**29. 26-Jan Modern Land Claims: Nunavut**

**30. 28-Jan Idle No More: Case Study – MMIW**

**VI. The Rights Response: The dilemmas posed by *Charter* litigation**

- 31. 02-Feb Introduction to the Charter: Joe Arvey, QC
- 32. 04-Feb Application of the Charter
- 33. 16-Feb Section 7: Life, Liberty and Security of the Person
- 34. 18-Feb Section 7
- 35. 23-Feb Section 15: Substantive Equality
- 36. 25-Feb Section 15
- 37. 02-Mar *Stare decisis: Case study – Carter v. Canada*
- 38. 04-Mar Section 2: Sexual Speech
- 39. 09-Mar Section 1: What it means to live in a free and democratic society
- 40. 11-Mar Section 1

**VII. Conclusion: How is the Constitution an Effective Instrument for the “Problem of Prostitution”?**

- 41. 16-Mar Panel discussion: *Bedford*
- 42. 18-Mar Working with the arguments
- 43. 23-Mar Working with the evidence
- 44. 25-Mar Remedy
- 45. 30-Mar Review
- 46. 01-Apr Review