Course Instructor: Neil Craik  
Contact Information: ncraik@uwaterloo.ca; ext. 33278  
Office Hours: Wednesday, 10 am - 12 pm.  
Class times: Mon/Wed 8.30 – 9.50 am  
Location: EV3 3412

Course Description

The course examines the historical development of the constitutional relationship between the Crown (the Canadian and provincial governments) and Aboriginal peoples, and its current impact on the development of resources in Canada. Particular focus will be paid to the judicial development of Aboriginal rights and Aboriginal title, the duty to consult and accommodate Aboriginal peoples in the context of resource development and the future trajectory of the relationship between the Crown, Aboriginal peoples, and resource developers.

The key learning objectives for the course are to develop a substantive understanding of the following areas:

- Historic relationship between Aboriginal peoples and the Crown, including pre-contact practices, Aboriginal sovereignty, (non) conquest and treaty making with colonial powers
- Defining Aboriginal peoples
- Pre-constitutional status of treaties
- The modern treaty and land claims process
- The constitutional framework respecting Aboriginal rights, including the division of powers over Aboriginal peoples and section 35, and the role of the courts
- The nature and establishment of Aboriginal rights and Aboriginal title
- The duty to consult and accommodate
- The impact of Aboriginal rights and the duty to consult on resource development
- Integrating the duty to consult with other development approvals, such as environmental assessment
• Impact and benefit agreements
• Reconciliation

In addition to gaining knowledge in these substantive areas, students will develop skills in reading and interpreting legal cases, as well as applying legal rules in the resource policy context. The course also seeks to instill students with a sense of the current legal and political salience of the historic relationship between Aboriginal peoples, the Crown and resource developers. Finally, the course seeks to provide students with a practical understanding of the current resource development challenges and imperatives and the practical steps that Aboriginal groups, governments and resource developers will need to take in order to move forward with development activities.

**Course Structure**

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<tr>
<th>Dates</th>
<th>Topic</th>
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<tr>
<td><strong>Week 1</strong></td>
<td>Historic Context: Pre contact and First Contact</td>
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<td>January 6/8</td>
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<tr>
<td><strong>Week 2</strong></td>
<td>Historic context: The Royal Proclamation and Historic Treaties</td>
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<td>January 13/15</td>
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<tr>
<td><strong>Week 3</strong></td>
<td>Pre-constitutional Cases and the Modern Treaty Process</td>
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<td>January 20/22</td>
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<tr>
<td><strong>Week 4</strong></td>
<td>The Constitutional Framework</td>
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<td>January 27/29</td>
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<tr>
<td><strong>Week 5</strong></td>
<td>Aboriginal Rights</td>
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<td>February 3/5</td>
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<tr>
<td><strong>Week 6</strong></td>
<td>Aboriginal Title</td>
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<tr>
<td>February 10/12</td>
<td><strong>Mid term</strong></td>
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<tr>
<td><strong>February 17-21</strong></td>
<td>READING WEEK – no classes</td>
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<td><strong>Week 7</strong></td>
<td>The duty to consult</td>
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<td>Feb 24/26</td>
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<td><strong>Week 8</strong></td>
<td>Implementing the Duty to Consult</td>
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<td>March 2/4</td>
<td>Introduction to the Negotiation Exercise</td>
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<td><strong>Case Comment/Short Paper Due (March 4)</strong></td>
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<td><strong>Week 9</strong></td>
<td>Impact and Benefit Agreements</td>
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<td>March 9/11</td>
<td>Social Licence to Operate</td>
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<td><strong>Week 10</strong></td>
<td>Indigenous Sources of Law</td>
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<td>March 16/18</td>
<td>International Indigenous Law – FPIC</td>
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<td><strong>Week 11</strong></td>
<td>Negotiation Preparation/guest speaker</td>
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<tr>
<td>March 23/25</td>
<td><strong>Background Papers and Position Sheet Due</strong></td>
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<tr>
<td><strong>Week 12</strong></td>
<td>Negotiation Tables</td>
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<tr>
<td>Mar 30/Apr 1</td>
<td><strong>Final Comment Paper Due (March 25)</strong></td>
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Course Materials

- Materials on LEARN (all listed readings not in Isaac will be provided on LEARN)

Course Evaluation

Participation: 10%

The following requirements are part of the participation assessment:

1) regular class attendance;
2) prior preparation;
3) in-class and on-line contributions to peer learning;
4) students will be required to lead discussions throughout the term.

Because participation is integral to the success of the seminar, attendance at each class is mandatory. Please advise the instructor in advance if you are going to miss a class.

The idea that animates the assessment of the participation requirement in this course is that each member of the course should be contributing to the learning of others.

Expectations

9+  - able to initiate and facilitate the development of ideas
    - comments are consistently insightful and raise questions or ideas that stimulate the learning of others
    - demonstrates critical reflection on readings
    - brings relevant and interesting resources (media, cases, articles) to the attention of others
8   - comments and questions demonstrate some critical analysis
    - consistently shares ideas
    - effort made to build on ideas of others
6-7  - raises occasional clarifying questions and comments
    - comments often not of a critical nature and do not demonstrate integration of material
Below 6  - no consistent contribution
    - little evidence of integrated learning
    - absent from class

Midterm: (25%) (February 12 – in class)

The midterm will cover material up to and including Aboriginal Title

Short Paper/Case Comment (25% - due March 4)
Students will be required to prepare a short paper or case comment on a topic of their choice. Students may either synthesize an area of Aboriginal law and provide some critical assessment or they may identify a suitable Aboriginal law case (not covered in class) and provide a critical summary of the case, including a discussion of the case’s significance for the area of law.

The short paper/case comment should be no more than 2500 words. Please put word count on front cover.

The assignment must be deposited in the dropbox on LEARN by 11.59 pm on the due date.

I will provide examples of short papers and case comments during term.

The assessment scheme is as follows:

<table>
<thead>
<tr>
<th>Mark</th>
<th>Expectations/Requirements</th>
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<tr>
<td>&gt; 90%</td>
<td>Exceptional (5% to 10%) Few or no technical errors (typos, spelling, grammar); clarity in writing style; coherent structure and flow; a degree of true originality; demonstration of very strong understanding of underlying substantive content; appropriate reference to source materials; paper presents a coherent and persuasive point of view</td>
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<tr>
<td>80 - 90%</td>
<td>Very good (15 to 25%) Few technical errors; strong understanding of underlying content; appropriate reference to source material; some attempt at originality; perhaps a few unreferenced points; paper well structured</td>
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<tr>
<td>72-80%</td>
<td>Good (30 to 50 %) Few technical errors; demonstrates solid understanding of material; well referenced;</td>
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<tr>
<td>65 to 72%</td>
<td>Adequate (10 to 20 %); some technical errors; demonstrates a basic understanding of material; some structure</td>
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<tr>
<td>50 to 65%</td>
<td>Marginal (0 to 10 %) An unacceptable number of technical errors; little attempt to present coherent viewpoint; demonstrates a weak understanding of material; inappropriate or missing references; lack of structure</td>
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<tr>
<td>&lt; 50%</td>
<td>Inadequate</td>
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**Negotiation Exercise (Background Paper and Position Sheet 20% - group mark; negotiation performance 10% - individual)**

During the last two weeks of term, we will engage in a negotiation exercise that will require students to represent different participants in a resource development negotiation scenario. Students will work in teams of three or four to develop a legal and policy understanding of their client’s position. The exercise will consist of three
separate elements. Each group will prepare a background paper, which will address legal aspects of their position, which will inform their negotiation. There will be a single group mark for the background paper, (but each student of the group will need to identify the areas for which they are chiefly responsible). The position sheet will be exchanged with other parties to the negotiation table in order that each participant understands the other starting positions around the table. Finally, in the last two weeks of class we will run two negotiation tables. Students will be expected to actively engage in the negotiation. The negotiation will be structured. Further direction will be provided during the term.

**Final Comment Paper (1000 words) (10%) due last day of term.**

Students will be asked to submit a final reflection paper on the following question:

Reconciliation is the central legal objective in Canadian Aboriginal law. Critically discuss the concept of reconciliation and whether the law in Canada is likely to successfully promote reconciliation.

**Late Papers**

It is expected that all course assessments be handed in on the date and time that they are due. Failure to do so will result in a mark reduction of 5% for the first day and 2% for every day thereafter to a maximum of 20%. Any assessment item that is more than 7 days late requires the instructor’s permission to hand in.

**Course Communication**

Communication by the instructor to students will be sent to students ‘uwaterloo’ email through LEARN or through postings to the course LEARN site. Students are responsible for ensuring prompt retrieval of course messages. **Any communication from students to the instructor should be via their ‘uwaterloo’ account and include “ENVS 401” in the subject line.**

**University and Faculty Requirements and Notices**

- **Academic Integrity**: In order to maintain a culture of academic integrity, members of the University of Waterloo community are expected to promote honesty, trust, fairness, respect and responsibility. [www.uwaterloo.ca/academicintegrity/](http://www.uwaterloo.ca/academicintegrity/). Students who are unsure what constitutes an academic offence are requested to visit the on-line tutorial at [http://www.lib.uwaterloo.ca/ait/](http://www.lib.uwaterloo.ca/ait/)
- **Research Ethics**: Please also note that the ‘University of Waterloo requires all research conducted by its students, staff, and faculty which involves humans as participants to undergo prior ethics review and clearance through the Director, Office of Human Research and Animal Care (Office). The ethics review and clearance processes are intended to ensure that projects comply with the Office’s Guidelines for Research with Human Participants (Guidelines) as well as those of provincial and federal agencies, and that the safety, rights and welfare of participants are adequately protected. The Guidelines
inform researchers about ethical issues and procedures which are of concern when conducting research with humans (e.g. confidentiality, risks and benefits, informed consent process, etc.). If the development of your research proposal consists of research that involves humans as participants, please contact the course instructor for guidance and see www.research.uwaterloo.ca/ethics/human/

♦ **Note for students with disabilities:** AccessAbility Services, located in Needles Hall, Room 1401, collaborates with all academic departments to arrange appropriate accommodations for students with disabilities without compromising the academic integrity of the curriculum. If you require academic accommodations to lessen the impact of your disability, please register with AccessAbility Services at the beginning of each academic term.

♦ **Religious Observances:** Please inform the instructor at the beginning of term if special accommodation needs to be made for religious observances that are not otherwise accounted for in the scheduling of classes and assignments.

♦ **Grievance:** A student who believes that a decision affecting some aspect of his/her university life has been unfair or unreasonable may have grounds for initiating a grievance. Read Policy 70 - Student Petitions and Grievances, Section 4, www.adm.uwaterloo.ca/infosec/Policies/policy70.htm. When in doubt please contact your Undergraduate Advisor for details.

♦ **Discipline:** A student is expected to know what constitutes academic integrity to avoid committing an academic offence, and to take responsibility for his/her actions. [Check the Office of Academic Integrity for more information.] A student who is unsure whether an action constitutes an offence, or who needs help in learning how to avoid offences (e.g., plagiarism, cheating) or about “rules” for group work/collaboration should seek guidance from the course instructor, academic advisor, or the undergraduate associate dean. For information on categories of offences and types of penalties, students should refer to Policy 71, Student Discipline. For typical penalties, check Guidelines for the Assessment of Penalties.

♦ **Appeals:** A decision made or penalty imposed under Policy 70 - Student Petitions and Grievances (other than a petition) or Policy 71 –(Student Discipline) may be appealed if there is a ground. A student who believes he/she has a ground for an appeal should refer to Policy 72 (Student Appeals) www.adm.uwaterloo.ca/infosec/Policies/policy72.htm

♦ **Turnitin.com:** Text matching software (Turnitin®) may be used to screen assignments in this course. Turnitin® is used to verify that all materials and sources in assignments are documented. Students' submissions are stored on a U.S. server, therefore students must be given an alternative (e.g., scaffolded assignment or annotated bibliography), if they are concerned about their privacy and/or security. Students will be given due notice, in the first week of the term and/or at the time assignment details are provided, about arrangements and alternatives for the use of Turnitin in this course. It is the responsibility of the student to notify the instructor if they, in the first week of term or at the time assignment details are provided, wish to submit the alternate assignment.
Detailed Course Outline and Readings

All readings other than Isaac will be available on this course’ LEARN site

Week 1 – Introduction & Pre-Contact

- Introduction to course
- Terminology
- Sovereignty, nationhood and land-use pre-contact and immediately post-contact

Readings:

- Report of the Royal Commission on Aboriginal Peoples, V.1, excerpts, up to p. 105
- Report of the Royal Commission on Aboriginal Peoples, V.2, excerpts on governance traditions
- Daniels v. Canada, 2016 SCC 12

Week 2 – Royal Proclamation & Historical Treaties

- The Royal Proclamation
- Historic treaties
- Oral v. written context

Readings

- The Royal Proclamation, 1763
- Treaty Map
- Sprague, “Canada’s Treaties with Aboriginal Peoples” (1996), excerpts
- Report of the Royal Commission on Aboriginal Peoples, V.1, excerpts, from p. 105
- Isaac p. 108-160
- Burrows, Wampum at Niagara*

Week 3 – Pre-Constitutional Cases and Modern Treaties

- Land-claims under the Indian Act
- Changes to Indian Act, 1951
- Growing indigenous organization/resource development
- Modern treaty system
- Specific land claims
Comprehensive land claims agreements

Readings:
- St. Catherine's Millings and Lumber Company v. The Queen (1888), 14 A.C. 46 (PC)
- Guerin v. The Queen, [1984] 2 S.C.R. 335
- Usher, Tough & Galois, 1992, excerpt*
- Isaac, 161-186*

Week 4 – Constitutional Framework
- Section 35
- Division of powers over Aboriginal matters

Readings:
- Constitution Act, 1867, ss91-92A
- Constitution Act, 1982
- Isaac, pp.16-23, 187 - 220

Week 5 – Aboriginal and Treaty Rights
- Defining Aboriginal rights
- Legal requirements
- Proving Aboriginal rights
- Infringement

Readings:
- Isaac, pp 24-43
- Lax Kw’alaams Indian Band v. Canada, 2011 SCC 56*
- Grassy Narrows First Nation v. Ontario, 2014 SCC 48*

Week 6 – Aboriginal Title
- The nature of Aboriginal title
- Establishing Aboriginal title
- Infringements
Readings

❖ Isaac, pp.67-107
❖ Tsilhqot’In Nation v. BC, 2014 SCC 44

Week 7 – Duty to Consult

➢ Origins of duty
➢ Honour of the Crown
➢ Nature of duty to consult

Readings

❖ Isaac, pp.302-326
❖ Haida Nation v. BC, 2004 SCC 73
❖ Mikisew Cree First Nation, 2005 SCC 69*
❖ Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53*

Week 8 – Implementing the Duty to Consult

➢ Consultation Guidelines
➢ EIA and Consultation
➢ Consultation and other processes

Readings

❖ Mikisew Cree First Nation v. Canada, 2018 SCC 40
❖ First Nation of Nacho Nyak Dun v. Yukon, 2017 SCC 58
❖ Federal Consultation Guidelines

Week 9 Impact and Benefit Agreements and the Social License to Operate

➢ What are IBAs?
➢ What do they cover?
➢ How do IBAs relate to Aboriginal rights and claims?
➢ Co-management

Readings
Irene Sosa and Karyn Keenan. (2001) “Impact and Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada” (CELA)


Newman, (2014) Be Careful What You Wish For. Why Some Versions of “Social Licence” are Unlicensed and may be anti-social.

**Week 10 - Indigenous Sources of Law and International Developments: FPIC and Human Rights**

- Indigenous Approaches to Law
- United Nations Declaration on the Rights of Indigenous Peoples
- Business and Human Rights

Readings

- UNDRIP
- Anaya, Report of Special Rapporteur on the Rights of Indigenous People*
- UN Guidelines for Business and Human Rights*

**Weeks 11 & 12 – Negotiation Tables**

No new readings

* indicates readings that are optional (for student benefit and as resources for assignments).