University of Waterloo  
Faculty of Environment

ENVS 401  
Aboriginal Law and Natural Resource Development

Winter 2021

Course Syllabus

Course Instructor: Neil Craik  
Contact Information: ncraik@uwaterloo.ca; ext. 33278  
Office Hours: by appt. via Bookings  
Class times: tbd  
Location: online

Course Description

The course examines the historical development of the constitutional relationship between the Crown (the Canadian and provincial governments) and Indigenous 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 Indigenous peoples in the context of resource development and the future trajectory of the relationship between the Crown, Indigenous peoples, and resource developers.

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

- Historic relationship between Indigenous peoples and the Crown, including pre-contact practices, Indigenous sovereignty, (non) conquest and treaty making with colonial powers
- Defining Indigenous 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 Indigenous 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 Indigenous 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 Indigenous groups, governments and resource developers will need to take in order to move forward with development activities.

Course Structure

<table>
<thead>
<tr>
<th>Dates</th>
<th>Topic</th>
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</thead>
<tbody>
<tr>
<td>Week 1</td>
<td>Historic Context: Pre contact and First Contact</td>
</tr>
<tr>
<td>Jan 11</td>
<td></td>
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<tr>
<td>Week 2</td>
<td>Historic context: The Royal Proclamation and Historic Treaties</td>
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<tr>
<td>Jan 18</td>
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<tr>
<td>Week 3</td>
<td>Pre-constitutional Cases and the Modern Treaty Process</td>
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<tr>
<td>Jan 25</td>
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<tr>
<td>Week 4</td>
<td>The Constitutional Framework</td>
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<tr>
<td>Feb 1</td>
<td></td>
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<tr>
<td>Week 5</td>
<td>Aboriginal Rights</td>
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<tr>
<td>Feb 8</td>
<td></td>
</tr>
<tr>
<td>February 15-19</td>
<td>READING WEEK – no classes</td>
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<tr>
<td>Week 6</td>
<td>Aboriginal Title</td>
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<tr>
<td>Feb 22</td>
<td></td>
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<tr>
<td>Week 7</td>
<td>Duty to Consult and Accommodate</td>
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<tr>
<td>Mar 1</td>
<td></td>
</tr>
<tr>
<td>Week 8</td>
<td>Case Comment Due – no new material</td>
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<tr>
<td>Mar 8</td>
<td></td>
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<tr>
<td>Week 9</td>
<td>Implementing the Duty to Consult: EIA and IBAs</td>
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<tr>
<td>Mar. 15</td>
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<tr>
<td>Week 10</td>
<td>International Indigenous Law – UNDRIP</td>
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<td>Mar 22</td>
<td></td>
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<tr>
<td>Week 11</td>
<td>Indigenous Sources of Law</td>
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<tr>
<td>Mar 29</td>
<td></td>
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<tr>
<td>Week 12</td>
<td>Reconciliation</td>
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<tr>
<td>April 5</td>
<td></td>
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</table>
The course is designed to be taken online. Each week there are assigned readings and prerecorded lectures, as well as a variety of group activities to be undertaken. Students must do the activities in the week that they are assigned.

The material in the course is cumulative, in the sense that you will find it difficult to skip readings and fully understand the subsequent materials. To help students better understand the material, students will be required to prepare some short essays in the first half of the course. This will enable the instructor to assess progress on an ongoing basis.

Each student will be assigned a group of approximately 4 to 5 students for the duration of the term. The groups will be required to meet synchronously online using the Microsoft teams platform (or a collaboration platform the team agrees to) in order to undertake assigned activities.

The group activities typically involve a short exercise that requires discussion and analysis by the group. After completing the exercise, the group must prepare and submit a short report. The group exercise, should take no more than 45 minutes and the report should only take 30 to 60 minutes to prepare. Group participation is mandatory, and group reports should indicate who was in attendance each week. Students will be asked to prepare a peer review of their group members at the end of term. The Groups will also engage in more detailed exercise on negotiating an Impact and Benefit Agreement.

The course instructor will hold live office hours to go over material and discuss issues. These sessions will be held at regular intervals. Attendance is not required, but recommended.

**Course Materials**

- Materials on LEARN

**Course Evaluation**

<table>
<thead>
<tr>
<th>Item</th>
<th>Date assigned</th>
<th>Date Due *</th>
<th>Contribution to final mark</th>
</tr>
</thead>
<tbody>
<tr>
<td>Short Papers</td>
<td>Assigned weekly in weeks 4, 5, 6, 7 (must do 3 of 4 weeks)</td>
<td>3 x 10% = 30%</td>
<td></td>
</tr>
<tr>
<td>Case comment</td>
<td>Feb. 8</td>
<td>March 12</td>
<td>30%</td>
</tr>
<tr>
<td>Final Comment Paper</td>
<td></td>
<td>April 12</td>
<td>10%</td>
</tr>
</tbody>
</table>
Group Work 1  
- Royal Proclamation exercise  
- Aboriginal rights exercise  
- Duty to Consult exercise  

| Group exercises will be assigned in weeks 3, 5, 7. Groups must prepare reports for all 3. |  | 15%  
|  |  | 5% (per Group Report) x3 |

Negotiation Exercise  
- Background Paper  
- Opening Statement  

| In your groups (same as above), you will be required to prepare a background paper in support of a negotiation scenario.  

Based on the background report, each person will be required to prepare an opening statement for the negotiation.  

Due in Week 11 |  | 15% (10% background; 5% Opening Statement – individual mark) |

* Due dates tentative. Final due dates and times will be posted in associated dropbox on course LEARN site.

**Short Papers (30%)**

In weeks 4 through 7, I will release a short essay question covering elements of the course. The response should be 400 to 600 words in length. Students are required to complete 3 of the 4 questions released.

Questions will be released on Monday and due the following Monday.

**Case Comment (30%)**

Students will be required to prepare a case comment on a topic of their choice. Students shall 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 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 case comments during term.
Final Comment Paper (10%) due first day of exams

Students will be asked to submit a final comment paper of no more than 1500 words 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.

Group Work 1 (15%)

Students will be form discussion groups and will be required to meet a number of times over the course of the term to engage in short exercises that require the students to apply the knowledge from the readings and lectures to interpretive exercises, factual scenarios and negotiation contexts. After completing the exercise, the group must prepare and submit a short report to their TA. The group exercise, should take no more than 45 minutes and the report should only take 30 to 60 minutes to prepare. Group participation is mandatory, and group reports should indicate who was in attendance each week. Students will be asked to prepare a peer review of their group members at the end of term. The group reports shall be marked for completeness, and evidence of engagement in the exercise. Students must submit reports for all 3 group exercises.

Negotiation Exercise (Background Paper 10% - group mark; opening statement 5% - individual mark)

Students will be provided with a negotiation scenario and assigned one of four parties to the negotiation. Working in your group, you will be required to prepare a background paper that analyzes, your client’s legal position and considers their negotiation strategy in this broader context. There will be a single group mark for the background paper. Each student will be required to prepare, on the basis of their group’s background report, an opening statement, setting out and justifying their client’s position. The opening statement will be marked on an individual basis. Further details and marking matrices will be provided later in the term.

Assessment Scheme for Papers

The assessment scheme for the case comment and final comment paper is as follows:

<table>
<thead>
<tr>
<th>Mark</th>
<th>Expectations/Requirements</th>
</tr>
</thead>
<tbody>
<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</td>
</tr>
</tbody>
</table>
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.

Grace Period

Students will have a total of 96 hours grace in total to hand in papers after the due date. This applies to the short papers, case comments, and final comment paper. (The 96 hours applies in total to all of these items.) Extensions within the 96 hour grace period do not need to be sought. I will not entertain other extension requests except for verified medical reasons.

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/).

<table>
<thead>
<tr>
<th>Range</th>
<th>Description</th>
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<tbody>
<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>
</tr>
<tr>
<td>72 - 80%</td>
<td>Good (30 to 50 %) few technical errors; demonstrates solid understanding of material; well referenced;</td>
</tr>
<tr>
<td>65 to 72%</td>
<td>Adequate (10 to 20 %); some technical errors; demonstrates a basic understanding of material; some structure</td>
</tr>
<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>
</tr>
<tr>
<td>&lt; 50%</td>
<td>Inadequate</td>
</tr>
</tbody>
</table>
unsure what constitutes an academic offence are requested to visit the on-line tutorial at 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, the 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 informs 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 will be available on this course’s 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

Lectures:

▪ Lecture 1a – intro to course
▪ Lecture 1b – Terminology
▪ Lecture 1c – Pre-Contact Indigenous Societies

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
❖ Burrows, Wampum at Niagara

Lectures

▪ Lecture 2a – The Royal Proclamation
▪ Lecture 2b – Historic Treaties
Week 3 – Pre-constitutional Cases and Modern Treaties

- Characterization of Aboriginal and Treaty Rights in early cases
- Canada's failure to comply with its treaty obligations
- Growing indigenous organization/resource development
- Judicial Recognition of Common law rights for Indigenous Peoples
- Beginning of the modern treaty system

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

Lectures

- Lecture 3a – St Catherine’s Milling
- Lecture 3b – Calder and Guerin

Week 4 – Constitutional Framework

- Section 35
- Constitutionalization
- Nature of Aboriginal and Treaty rights
- Infringement

Readings:

❖ Constitution Act, 1982

Lectures

- Lecture 4a – s.35 and Aboriginal Rights: The Sparrow Test
- Lecture 4b – Interpreting Treaty Rights under s.35: Badger

Week 5 – Aboriginal and Treaty Rights

- Defining Aboriginal rights
- Legal requirements
- Proving Aboriginal rights
- Infringement
Readings:


Lectures

▪ Lecture 5 – Aboriginal Rights

**Week 6 – Aboriginal Title**

➢ The nature of Aboriginal title
➢ Establishing Aboriginal title
➢ Infringements

Readings

❖ Tsilhqot’ın Nation v. BC, 2014 SCC 44

Lectures

▪ Lecture 6 Aboriginal Title

**Week 7 – Duty to Consult**

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

Readings

❖ Haida Nation v. BC, 2004 SCC 73
❖ Mikisew Cree First Nation, 2005 SCC 69

Lectures

▪ Lecture 7a – Haida Nation and the Duty to Consult
▪ Lecture 7b – Accommodation

**Week 8 – Case Comment due – no new material**
**Week 9 Implementing the Duty to Consult and Accommodate in the Resource Process: EIA and IBAs**

- DTC and EIAs
- What are IBAs?
- 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)

**Lectures**

- Lecture 9 – EIAs and Impact and Benefit Agreements

**Week 10 – International Law and Indigenous Rights: The UNDRIP**

- United Nations Declaration on the Rights of Indigenous Peoples
- Implementing UNDRIP in Canada

**Readings**

- The United Nations Declaration on the Rights Indigenous Peoples
- Canadian Statements on UNDRIP
- CIGI, UNDRIP Implementation Report
- Case excerpts on Using UNDRIP to interpret Canadian law

**Lectures**

- Lecture 10 – International Indigenous Human Rights

**Week 11 - Indigenous Sources of Law**

- Indigenous Approaches to Law

**Readings**

John Burrows, With or Without You (First Nations Law (in Canada))

Val Napoleon, Tsilhqot’in Law of Consent

Lectures

- Lecture 11 – Indigenous Sources of Law

**Week 12 – Reconciliation – no new material**

- Reconciliation as a political, legal and social goal