

**POLI 371: The Challenges of Canadian Federalism
Fall 2023 CRN 5122 (Web version)**

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Please verify course time and location on Minerva. I will share my office hours on MyCourses.

McGill University is on the traditional territory of the Anishinaabeg and Haudenosaunee Nations and a place which has long served as a site of meeting and exchange amongst various Indigenous nations.

This course examines the development and operation of Canada's federal system. It examines both the historical evolution of the Canadian federal compact and the contemporary operation of Canadian federalism in selected policy areas. The goals of the course are to impart a theoretically and historically informed understanding of how Canada's federal system came to be, as well as to develop students' understandings of how federalism as a constitutional structure affects the contemporary development and delivery of public policy.

Class-wide communications

When I need to communicate with the class as a whole, I will do so via the news alert function in mycourses. Please sign up for these notifications. If you do not, you will receive them when you log into the mycourses site, instead of when I send them.

Plagiarism

McGill University values academic integrity. Therefore, all students must understand the meaning and consequences of cheating, plagiarism and other academic offences under the Code of student conduct and disciplinary procedures (see www.mcgill.ca/integrity for more information).

L'université McGill attache une haute importance à l'honnêteté académique. Il incombe par conséquent à tous les étudiants de comprendre ce que l'on entend par tricherie, plagiat et autres infractions académiques, ainsi que les conséquences que peuvent avoir de telles actions, selon le Code de conduite de l'étudiant et des procédures disciplinaires (pour de plus amples renseignements, veuillez consulter le site <http://www.mcgill.ca/integrity>).

Texts

Every student needs to become familiar with the Constitution Acts (1867, 1982). We will be referring to various sections throughout the course, mostly from the *Constitution Act, 1867*. You can find the consolidated Acts on the Department of Justice website at <http://laws.justice.gc.ca/en/const/index.html>. I have also put the consolidated Acts on mycourses. You can print it off and carry it around with you everywhere you go (#joy).

All course readings are available on mycourses.

Government Delegations

After add/drop (September 12) I will randomly assign students into government delegations. The delegations will write a group assignment, the memorandum to cabinet. The delegations will also be the basis for the first ministers' conference (FMC) simulation. The FMC will occur over 2 classes in November. The FMC will be on a proposal to formally amend the Constitution of Canada. The conference may or may not result in a constitutional amendment. The FMC simulation will be the subject of a class-long debrief at the end of the term.

General Points about Written Assignments

In accord with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded. (approved by Senate on 21 January 2009)

Written work is to be submitted both electronically and in hard copy. The electronic submission will be through the assignments or discussions functions in mycourses. The time the written work is uploaded to mycourses will be used to determine whether the student(s) met the deadline. A hard copy can be handed in to me either in class or at my office, a maximum of 48 hours after the electronic submission deadline. I ask you to respect the hard copy policy as a professional courtesy. If I don't have the hardcopy when marking begins, you risk not having your grade posted on time.

Unless otherwise specified in this syllabus, a penalty of 5% per day will be enforced on late submissions. The cut-off time is **23h59 on the stated due date**. If student(s) fail to electronically submit the written work within 3 days after the deadline, then I will assign a J grade. **A J grade means the student(s) will fail the course**. I highly recommend that if a student or group of students have encountered serious impediments to completing the written work, to communicate with me as soon as possible. However, be warned that "I/we was/were too busy given all of my/our commitments" is not what I consider a serious impediment.

With respect to group work, each member of the group will receive the same mark. I reserve the right to adjust individual marks if: 1) group members collectively document and inform me of a group member's serious failure to meet his/her responsibilities and deadlines established by the group; 2) that I am informed of this failure at least one week before the graded group assignment is due. You do no one any favours by covering for a group member who isn't pulling their weight. There are many possible reasons why a student may not be doing their part. Some of these reasons are really good ones. Inform me of the problem in time so that I can deal with the student directly and appropriately. In the absence of a good reason, penalties I may impose on the student may include an F grade for seriously deficient work; or a J grade for no effective participation or actual obstruction of the group's collective enterprise.

Specific Points about Assessment

Memorandum to Cabinet (MC) (20%): Due on November 9. This is a group assignment.

The memo to cabinet is the primary information and strategy document that leads a government to adopt a confidential negotiating position for the FMC simulation. The format for the MC is

based on the one used by the Privy Council Office. The (modified) document on the structure of the MC is available on MyCourses.

Please note the following recommendation: I will assign groups right after the add/drop deadline. I strongly suggest that the group meet immediately in order to go over the MC requirements and assign responsibilities and an internal timeline to complete the group assignments. I suggest that one member of the group be assigned as the “final pen”, a person whose primary responsibility is to edit and craft a final document for coherence, readability, and overall quality. In your timeline allow for the completion of all of the written elements of the MC prior to this final editing stage.

FMC Attendance on November 21 and 23 (10%): I will not be grading your negotiating skill, nor your ability to reach a particular outcome at the end of the FMC. I will, however, grade your (in person) attendance. If you attend and participate in the FMC in its entirety, you will get all of the 10%. If you don't attend in its entirety, you get none of the 10%. In the event a student is unable to attend the FMC in its entirety for a serious and documented reason, the 10% of their course grade will be re-allocated to their final exam. Please be advised that being elsewhere to celebrate American Thanksgiving is **not** a serious and documented reason.

Argumentative Paper (20%): Due on December 5. This is an individual assignment.

The analysis will be a maximum of 3000 words, excluding the bibliography. Please use in-text citation (author, date/page) accompanied with a bibliography. Students are to indicate the word count on the first page of the paper. The paper will engage directly with at least two readings on the syllabus and include at least 5 academic publications in the bibliography.

The task of the analysis will be to build an argument about Canadian federalism. An argument consists of a conclusion, and premises. In other words, the student will try to persuade the reader of a particular point (ie. the conclusion), by offering reasons (ie. the premises). A successful paper addresses a serious objection to the author's argument. By doing so, you show that you are able to understand and address the limitations to your own position. A core challenge in this short assignment is to write cleanly, efficiently, and thoughtfully within relatively few words. The short length of the assignment means that every sentence and paragraph need to move your point forward. It's short, not easy.

For a very useful precis of writing an argumentative paper, check out

<http://www.alisonmcqueen.info/new-page-1>

Papers that have no clear argument will fail outright. Papers that have a weak argument (eg. problems with its logic, weak engagement with the federalism literature), or suffer from bad essay structure (eg. unclear introduction, bad transitions between sections, jumbled writing), or that do not deal with an objection, will be graded at best in the C range. A B- or B paper does everything necessary (ok argument, ok writing, deals with a basic objection), but only does so adequately. A B+ paper does all of these things really well – a B+ in my view is a very good and above average paper. An A range paper is, by definition, a paper that stands out on all elements, and does so to a degree that stands out relative to the peer group. Yes, there is always an implicit curve in grading. An A- paper is a real achievement, and an A paper (since at McGill there is no

A+ on the grading scale) is a truly outstanding piece of work. In my experience, there is always at least one A- paper, but there is often no A paper.

Final Exam (50%): Final exams will be based on all course materials and be held during the formal final exam period. According to Senate regulations, instructors are not permitted to make special arrangements for final exams. Please consult the Calendar, section 4.7.2.1, General University Information and Regulations at www.mcgill.ca. Generally (and without prejudice), the exam consists of three types of questions: 1) definitions/IDs; 2) questions on the required readings (eg. What is X's argument? What is X arguing against?); 3) argumentative long answer questions that ask you to integrate the course material. The essay questions will require you to show your understanding of both theory and policy. The final exam will require you to link authors' actual names to their arguments.

Course Outline

Aug 31: Introduction

Welcome to the class! I'll set out why this course is structured the way it is, in terms of both content and assessment.

Sept 5: Simulation I

Students will be organized into small groups and the simulation scenario will be revealed in class. Class discussion to follow.

Sept 7 and Sept 12: Federalism Definitions, Virtues, and Vices

Stephen Tierney. 2022. *The Federal Contract: A Constitutional Theory of Federalism*, (Oxford: Oxford University Press). Chapter 3: The Foundations of Federalism (pp.57-81)

Jenna Bednar. 2009. *The Robust Federation: Principles of Design*. Cambridge University Press. Chapter 3: The Federal Problem (pp.63-94)

Sept 14: Narratives about the Federation

Robert C. Vipond. 1989. "1787 and 1867: The Federal Principle and Canadian Confederation Reconsidered". *Canadian Journal of Political Science*, vol.22, no.1 (March), pp.3-25

Samuel Laselva. 1996. *The Moral Foundations of Canadian Federalism; Paradoxes, Achievements, and Tragedies of Nationhood*. Montreal and Kingston: McGill-Queens University Press. Chapter 2: Confederation and the Beginnings of Canadian Federalism Theory, pp.31-48

British North America Act, 1867

Kiera Ladner. 2003. "Treaty Federalism: An Indigenous Vision of Canadian Federalisms", in François Rocher and Miriam Smith (eds), *New Trends in Canadian Federalism*, second edition (Peterborough: Broadview Press), pp.167-194

Sept 19: The Division of Powers, and other Bits

Sections 55, 56, 90 Constitution Act, 1867

Sections 91 to 95, Constitution Act, 1867

W.R. Lederman. 1981. *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada*. Toronto: Butterworths. Chapter 12: Classification of Laws and the British North America Act (originally published in 1953).

Sept 21: Challenges to Centralized Federalism: Provincial Rights and the (Demise of) the Disallowance and Reservation Powers

Robert C. Vipond. 1985. "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada". *Canadian Journal of Political Science*, vol.18, no.2 (June), pp.3-25

Luc Turgeon and Jennifer Wallner. 2013. "Adaptability and Change in Federations: Centralization, Political Parties, and Taxation Authority in Australia and Canada", in Grace Skogstad et al. (eds). *The Global Promise of Federalism*. Kingston and Toronto: Institute of Intergovernmental Relations, and the University of Toronto Press. Pgs. 188-213

Sept. 26: Challenges to Decentralized Federalism: The Welfare State and the Federal Spending Power

Keith Banting. 2005. "Canada: Nation Building in a federal welfare state", in Herbert Obinger et al (eds), *Federalism and the Welfare State: New World and European Experiences*. Cambridge University Press. Pgs. 89-137

Hoi Kong. "The Spending Power in Canada", in Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution*, Oxford University Press, 2017. DOI: 10.1093/law/9780190664817.003.0020

Sept. 28: Patriation and Quebec

Pierre Elliott Trudeau. 1968. *Federalism and the French Canadians*. Toronto: The Macmillan Company of Canada. The chapter entitled "Quebec and the Constitutional Problem", pp.3-51

Pierre Elliott Trudeau. 1968. *Federalism and the French Canadians*. Toronto: The Macmillan Company of Canada. The chapter entitled "A Constitutional Declaration of Rights", pp.52-60

Guy Laforest. 2009. "The Internal Exile of Quebecers in the Canada of the Charter", in James B. Kelly and Christopher P. Manfredi (eds). *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*. Vancouver: UBC Press. Pgs 251-262

Sept 23: Patriation and the West: section 92A

J. Peter Meekison, Roy J. Romanow, William D. Moull. 1985. *Origins and Meaning of Section 92A: The 1982 constitutional amendment on resources*. Montréal, Québec: Institute for Research on Public Policy

Bankes, Nigel and Leach, Andrew, Preparing for a Midlife Crisis: Section 92A at 40 (October 31, 2022). Forthcoming, *Alberta Law Review*, Vol. 60, No. 4, 2023, Available at SSRN: <https://ssrn.com/abstract=4262958> or <http://dx.doi.org/10.2139/ssrn.4262958>

October 5: Amending the Constitution Post 1982: Part V

Part V of the Constitution Act, 1982

Adam Dodek. 2016. "Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the Constitution Act, 1982, " in Emmett Macfarlane (ed.) *Constitutional Amendment in Canada* (Toronto: University of Toronto Press): pp. 42-64.

Oct. 12: No lecture. This time is to be used for work on the group assignment.

Come and use the classroom or find a different place to work together. I will not be in the classroom.

October 17: Federalism and the Limits of Judicial Enforcement

Jenna Bednar. 2009. *The Robust Federation: Principles of Design*. Cambridge University Press. Chapter 4: The Safeguards of Federalism. Read the section on the judicial safeguard (section 4.4, pp.119-125)

Robert Schertzer.2008. "Recognition or imposition? Federalism, national minorities, and the Supreme Court of Canada". *Nations and Nationalism*, 14: 105-126.
<https://doi.org/10.1111/j.1469-8129.2008.00324.x>

Kate Puddister, "The Canadian Reference Power: Delegation to the Courts and the Navigation of Federalism," *Publius: The Journal of Federalism*, Volume 49, Issue 4, Fall 2019, Pages 561–586, <https://doi.org/10.1093/publius/pjy034>

Oct. 19 and Oct. 24 Indigenous Peoples and the Division of Powers: s.91(24)

Various Archival documents (mycourses)

Daniels v. Canada (Indian Affairs and Northern Development) [2016] 1 S.C.R. 99

Jason Madden. 2021. "After the Hysteria: Understanding Daniels v. Canada from a Métis Nation Perspective", in Nathalie Kermaol and Chris Andersen, eds. *Daniels v. Canada: In and Beyond the Courts*. (Winnipeg: University of Manitoba Press), pp.44-77

Christa Scholtz. 2020. "Treaty Failure or Treaty Constitutionalism?: The Problematic Validity of the James Bay and Northern Quebec Agreement." *University of Toronto Law Journal*, vol.70, no.3, pp.306-340

Oct. 26 and Oct.:31 Fiscal Federalism and the Equalization Transfer Program

Jonathan Rodden. 2006. *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism*. Cambridge University Press. Chapter 3: Sovereignty and Commitment

Daniel Béland et al. 2017. *Fiscal Federalism and Equalization Policy in Canada*, Toronto: University of Toronto Press. Chapter 4 (Equalization and the Federal Transfer System).

November 2: Cooperative Federalism? Delegation versus concurrency

Attorney-General of Nova Scotia v. Attorney-General of Canada [1951] SCR 31

Christa Scholtz and Andrei Munteanu. "How cooperative is "cooperative federalism"? The political limits to intergovernmental cooperation under a de facto concurrency rule." *Constitutional Political Economy*, vol. 34 (2023): 111-134.

November 7: Cooperative Federalism and Climate Change

Brendan Boyd. 2017. "Working Together on Climate Change: Policy Transfer and Convergence in Four Canadian Provinces", *Publius: The Journal of Federalism*, vol.47, no.4, pp.546-571

Brendan Boyd. (2019). "A Province under Pressure: Climate Change Policy in Alberta." *Canadian Journal of Political Science*, 52(1), 183-199. doi:10.1017/S0008423918000410

November 9: *Memorandum to Cabinet due* - A Lecture on Arguments

There are no assigned readings. I will not lecture on substantive course material.

Instead, I will talk about arguments. I do this because the argumentative paper will be due in under a month. This lecture is designed to help you focus on that assignment.

November 14: Citizens and Federalism Enforcement

Jenna Bednar. 2009. *The Robust Federation: Principles of Design*. Cambridge University Press. Chapter 4: The Safeguards of Federalism. Read the section on the popular safeguard (section 4.2, pp.107-113)

Cutler, F. (2017). Political Conditions for Electoral Accountability in Federalism. *Canadian Journal of Political Science*, 50(4), 1037-1059. doi:10.1017/S0008423917000282

November 16: Citizens and Federal Culture

Rocher, Francois and Patrick Fafard, 2013, "Is There a Political Culture of Federalism in Canada?" in Skogstad et al. (eds.) *The Global Promise of Federalism*. Institute of IGR, Queen's, and University of Toronto Press.

David McGrane, Loleen Berdahl, "Reconceptualizing Canadian Federal Political Culture: Examining Differences between Quebec and the Rest of Canada," *Publius: The Journal of Federalism*, Volume 50, Issue 1, Winter 2020, Pages 109–134, <https://doi.org/10.1093/publius/pjz010>

November 21 and November 23: FMC simulation

Locations to be announced on mycourses.

November 28: FMC in class debrief

November 30: Review Session

December 5: Argumentative Paper Due. No assigned readings.