

POLI 436
Aboriginal and Treaty Rights and the Canadian Constitution
(aka. Part II, *Constitution Act 1982*)
CRN 4539 Winter 2024
Department of Political Science, McGill University

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

Logistics

Professor: Christa Scholtz

Class location and time is available on Minerva. Information with respect to office hours is available on mycourses.

Class communication: I will use the news feature on mycourses to make any announcements to the class. Please sign up for notifications on mycourses. If you do not do so, you will only receive the announcement when you log into mycourses, and not when I actually send it.

Course context with respect to other POLI courses

This course focuses on the inclusion of Aboriginal and treaty rights in the Canadian constitution, specifically through Part II of the *Constitution Act, 1982*. We will address questions like: 1) what place did Indigenous peoples and the rights they hold or claim have in the Canadian constitutional framework prior to 1982; 2) what are the stories about how Part II came to be included in the *Constitution Act, 1982*, and what did constitutional drafters think they were doing by including it; 3) how have Canadian courts interpreted this section, and 4) has the promise of Part II been realized?

This is a 400 level course in Canadian politics. As such, I will assume that everyone in the room has both a working knowledge of Canadian political history and a reasonable familiarity with the Constitution Act, 1867 and the Constitution Act, 1982. If you do not have these two things, you will be at a decided disadvantage in this course.

Learning Outcomes

By the end of this course you should be able to:

- 1) Identify key political and judicial terms relating to Part II rights;
- 2) Identify an author's argument in a text, and answer how that author contributes to a normative debate on how Indigenous peoples and their rights should relate to the Canadian constitution;
- 3) Link how authors' arguments relate to each other;
- 4) Analyze judicial decisions within a political context, by;

- a. linking the political interests of the parties involved with the legal arguments they put forward in court;
 - b. explaining about how judicial arguments may have political effects (by shifting bargaining power, for example, across political actors);
- 5) Develop critical analysis and critical writing skills through peer review.

McGill Policy Statements (So. Many. Statements.)

Language of Submission: 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. This does not apply to courses in which acquiring proficiency in a language is one of the objectives. Conformément à la Charte des droits de l'étudiant de l'Université McGill, chaque étudiant a le droit de soumettre en français ou en anglais tout travail écrit devant être noté (sauf dans le cas des cours dont l'un des objets est la maîtrise d'une langue).

Academic Integrity: 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 [McGill's guide to academic honesty](#) for more information).

Extraordinary Circumstances: In the event of extraordinary circumstances beyond the University's control, the content and/or evaluation scheme in this course is subject to change.

Copyright of Lectures: All slides, video recordings, lecture notes, etc. remain the instructor's intellectual property. As such, you may use these only for your own learning (and research, with proper referencing/citation) ends. You are not permitted to disseminate or share these materials; doing so may violate the instructor's intellectual property rights and could be cause for disciplinary action.

Warning: Ensure there is electronic backup of your work

Surprisingly often I find myself dealing with a very stressed out student whose computer has died/was stolen/hijacked by ransomware/run over by a bus, yielding the situation where the paper that is due in hours or minutes is for all intents and purposes non-existent. Right now (yes, this means you, and this means right now) think of your computer and imagine that it actually disappeared 2 minutes ago. In how much trouble and trauma are you right now? If the answer is "loads", then it is because you have not backed up your work. You need a system.

If you haven't already developed a backup system for yourself, this is mine. Borrow or modify it at will. I have an automatic backup program set up for a weekly backup to an external hard drive. So, I should at most be one week behind if my computer dies or is stolen. In addition, when I am writing a paper, I email the draft to myself at the end of the day.

Note that I have become entirely unsympathetic to student requests for emergency paper extensions due to the foreseeable and preventable problem that your digital paper has effectively disappeared. No extensions for that reason will be granted. If the situation arose that your computer, your external hard drive/cloud server, the McGill email server, and the McGill backup of its email server all disappeared at the same time, then I suspect we have bigger problems than POLI 436 to deal with. #postapocalypticellscape

Course Assessment

There are 4 types of course assessment: 1) written peer review, 2) participation in 3 peer review activities, 3) term paper, 4) final exam. These are set out in turn below.

Peer Review (15% for written assignments and 5% for participation in 3 activities)

This course will incorporate a peer review component within class time and the evaluation structure. My goal is to model peer review before you are assessed in a peer review role. To that end, there will be three class activities. Your participation in each of these three activities will be graded in this way:

- Participation in the peer review activities is worth 5% of your course grade
- The participation mark will be out of 3 points. One (1) point will be for participating in each activity.
- You will not get the point if you are absent, or if your participation is lazy, demeaning, engages in an *ad hominem* attack, or is thoughtless. In other words, the standard to get a point is pretty low. It is, essentially: show up, take the task seriously, and treat your peers with respect.

Activity 1: Writing a draft peer review as a group. The goal of this activity will be to model the peer review process prior to engaging with each other's draft written work. This group peer review will not itself be graded. I will upload a draft term paper onto mycourses, which all students will be required to read before class. The author of the draft paper will be anonymous, but the reviewers are not. I will also provide a grading rubric for a written peer review submission. Each student must come prepared with at least 3 concrete points that they wish to convey to the author. I will divide students into small groups, and the groups will write a group review of the draft. The group review should be written in bullet points – the goal here is to convey concrete feedback quickly, not to submit a polished written text. If there is important disagreement across group members about the draft, the review should reflect the nature and extent of this disagreement. Each group's review will be uploaded to mycourses and shared to the entire class.

Activity 2: The thesis speed date. Students are to prepare a short paragraph, where they sketch out a proposed argument for their term paper. This consists of a conclusion to the argument (the thesis statement) and what they suspect will be the main premises leading to the conclusion. Students will show up in class with 1) their paragraph written on a piece of paper, with 2) two blank pieces of paper stapled to the first, 3) and a good pen or pencil (however you roll). Over the course of the exercise, you will read a number of your peers' paragraphs, and provide

feedback on them. The feedback may quite wide ranging, including: issues with conceptual clarity, logical problems, methodological challenges, premises the student has not considered but the reviewer feels must be, readings or literature (primary or secondary) that the student should know about. The goals of this component are: 1) to get students working on their papers earlier than they might otherwise, 2) to cultivate the practice of sharing early ideas with peers even when those ideas are still quite mushy and unpolished, 3) to engage students as critical allies at the earliest stages of a peer's intellectual project, where the marginal impact of solid feedback is arguably at its highest.

Writing formal peer reviews: The peer reviews are graded. Students will upload their draft term papers by the due date. The version uploaded will have no identifying information. Each student will then be responsible for reading two draft papers, and will write formal written reviews of those papers by the due date. Failure to submit both reviews by the due date will receive an F on the review component. I will grade the weaker of the two reviews, and that grade will be worth 15% of the course grade. Maximum word count per review is 800 words.

I will confirm logistics for uploading the reviews at a later date.

Activity 3: In-person peer review session, where reviewers and authors will be groups together and reviewers will share their reviews. This provides authors and reviewers the opportunity to discuss the draft papers in real time.

Term Paper (30%)

- 1) The paper should be a minimum of 5000 words and a maximum of 6000 words. In this paper you will ask a question, provide a clear answer to it, provide reasons for why your answer is a good one, and deal with a serious objection to your answer. In short, you will write an argumentative paper.
- 2) Draft papers will be electronically submitted with no identifying information. I will confirm the logistics closer to the date (ie. will it be uploaded to mycourses or to a different software platform). The submission deadline is March 27, at 23h59.
- 3) The final term paper (including identifying information) is to be submitted to mycourses on or before April 12, 23h59. The date and time that the paper is electronically submitted will be used for the purpose of determining late penalties.

Late penalties

Draft term paper: Failure to submit the draft term paper by the deadline will result in a **5%** reduction of *your overall course grade*. I recognize that this is a significant penalty. It reflects the responsibility that you owe to your peers. If you do not submit your paper by the deadline, it will not be reviewed.

Final term paper: The final term paper will be penalized 5% for each day late, for a maximum of 3 days late. After 3 days late, the final paper will not be accepted and receive a J. In other words, you will fail the course.

Final Exam (50%)

Written closed-book exam on all course material that will be conducted during the final exam period. The exam time will be set by the Exam Office.

Summary of Important Dates

February 7: Peer review activity 1 (Group draft review)

March 1: Peer review activity 2 (Thesis speed date)

March 27 at 23h59: Draft term paper due

April 2 at 23h59: Peer reviews due

April 3: Peer review activity 3 (Reviewers meet authors)

April 12 at 23h59: Final term paper due

Course Outline

All of the course readings are available on mycourses.

January/05: Introduction

I will introduce myself and the course. Students will be expected to participate in the discussion by sharing one question that they hope to have answered by the end of the course.

January/10-12-17: Of constitutionalisms, sovereigns, rights versus responsibilities

Political Philosophy Podcast (by Toby Buckle). Episode dated January 31, 2020: Thomas Hobbes With Arash Abizadeh. This episode is about 1 ¼ hour long. It's best to listen to it all to see how the argument builds, but if that is not possible, these are the sections I want you to absolutely listen to:

10:15-12:50 Hobbes' state of nature as war

30:02-51:39 Obligations in the state of nature, personhood, the nature of the state

1:03:20-1:11:00 Allegiance to the sovereign, absolutism, the fragility of order

Marmor, Andrei. "Are Constitutions Legitimate?" *Canadian Journal of Law and Jurisprudence* 20 (2007): 69-94.

Entitled: Why Rights Matter and What's the Matter With Rights (Podcast by the University of Chicago Podcast Network). Season 1, episode 6: The River Knows Where to Go. October 2021.

- Prof. Aaron Mills joins the podcast after 14:42. Again, it is best to listen to the podcast from the beginning. Otherwise it will be harder to understand the challenge Prof. Mills is bringing to the conversation.

Aaron Mills, Karen Drake, and Tanya Muthusamipillai. 2017. "An Anishinaabe Constitutional Order", in Hon. Patrick Smith (ed.), *Reconciliation in Canadian Courts: A Guide for Judges to Aboriginal and Indigenous Law, Context and Practice* (Ottawa: National Judicial Institute), 260

Amanda Byer. 2023. *Placing Property: A Legal Geography of Property Rights in Land*. Palgrave Socio-Legal Studies. Palgrave Macmillan. Chapter 3: Locke and the Homogenisation of the Landscape

January/19-24-26: Getting to Confederation

Royal Proclamation of 1763, RSC 1970, Appendix II, No 1

British North America Act, 1867, 30 & 31 Victoria c.3

Borrows, John. 1997. "Wampum at Niagara: Canadian Legal History, Self-Government, and the Royal Proclamation." In Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, Vancouver: UBC Press, 155-172

Kiiwetinepinesiik Stark, Heidi. 2013. "Marked By Fire: Anishinaabe Articulations Of Nationhood In Treaty-Making With The United States And Canada." In Brian Hosmer and Larry Nesper (eds), *Tribal Worlds: Critical Studies in American Indian Nation Building*, Albany: State University of New York, 111-140

Aaron Mills / Waabishki Ma'iingan. 2017. "What is a Treaty? On Contract and Mutual Aid", in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties*. Toronto: University of Toronto Press, 208-247

January 31, February 2: Getting Part II

Joshua Nichols. 2020. *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada*. Toronto: University of Toronto Press. Part 3: A Despotism for Dealing with Barbarians: A Survey of the Foundations of Indian Policy in Canada.

Letter dated July 4, 1979, from Noel V. Starblanket (President, National Indian Brotherhood) to Her Majesty Queen Elizabeth II.

R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta and others [1982] 1 QB 892: 598-9, 602.

“Amending the Constitution: Canada Addresses and Enshrines the Issue of Aboriginal Rights.” CBC, March 16, 1983: <https://www.youtube.com/watch?v=Lvo4GRqh8a0>

Louise Mandell and Leslie Hall Pinder. “Tracking Justice: The Constitution Express to Section 35 and Beyond”, in Lois Harder and Steve Patten (eds), *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015), pgs. 181-202

February 7: Peer Review Activity I

February 9: Amending Part II: Full Box? Empty Box?

Kiera Ladner. “An Indigenous Constitutional Paradox: Both Monumental Achievement and Monumental Defeat”, in Lois Harder and Steve Patten (eds), *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015), pgs. 267-289.

Assembly of First Nations. Proposals for Amendments and Additions to the Constitution Act, 1982, Presented by Dr. David Ahenakew, National Chief. Ottawa, 1983.

Jim Sinclair’s (Metis National Council) statement at the conclusion of the FMCs in 1987: https://www.youtube.com/watch?v=miJqS_Pz9JE

Le 22 juin 1990, Elijah Harper du Manitoba refuse le débat sur l'accord du Lac Meech (Radio Canada archival footage): <https://www.youtube.com/watch?v=P5zFk837yuo>

Lameman, Al, and Roy Fox. “A Message to all Canadians from First Nations of Treaty 6 and 7.” *The Globe and Mail*, September 24, 1992, A11.

February 14-16-21: Enter the Courts: Reconciliation and the Honour of the Crown

Guerin v. The Queen, [1984] 2 SCR 335.

R. v. Sparrow, [1990] 1 SCR 1075.

Wewaykum Indian Band v. Canada [2002] 4 SCR 245

Haida Nation v. B.C. [2004] 3 SCR 511

Manitoba Métis Federation Inc. v. Canada (Attorney General) [2013] 1 SCR 623

Mikisew Cree First Nation v. Canada (Governor in Council) [2018] 2 SCR 765

February 23: Defining an Aboriginal Right

R. v. Van der Peet, [1996] 2 SCR 507

R. v. Adams, [1996] 3 SCR 101

February 28: Aboriginal Self-Government

R. v. Pamajewon, [1996] 2 SCR 821

March 1: Peer Review Activity II: Thesis Speed Date

March 13: Aboriginal Self-Government

(The assigned reading will depend on whether the SCC has handed down its decision on *Re: FNIM Child/Family Act*)

March 15-20-22 Aboriginal Title

Calder v. British Columbia (Attorney General) [1973] SCR 313

Delgamuukw v. British Columbia, [1997] 3 SCR 1010

Tsilhqot'in Nation v. British Columbia, [2014] 2 SCR 257

March 27: Draft Term Papers Due. No class.

April 2 at 23h59: Peer reviews due.

April 3: Peer Review Activity III: In-class activity.

April 5-10: Treaty Rights

R. v. Sioui [1990] 1 SCR 1025

R. v. Badger [1996] 1 SCR 771

First Nation of Nacho Nyak Dun v. Yukon, [2017] 2 SCR 576

April 12: Final Term Paper Due in mycourses. In- class review session.