

## LAW 358D.003

### TOPICS IN FIRST NATIONS LAW: CURRENT LEGAL ISSUES

2019-20

PETER A. ALLARD SCHOOL OF LAW  
UNIVERSITY OF BRITISH COLUMBIA

#### **Instructor:**

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#### **Class Meeting Times and Location:**

Monday                      9:00 – 12:00                      Allard Hall 111

#### **Contact Hours:**

By appointment: please email my assistant, Stacey Poole, for details:  
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#### **Policies on Academic Misconduct (Plagiarism):**

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can also be found in the UBC Annual Report on Student Discipline (<http://universitycounsel.ubc.ca/discipline/>).

## **Course Description:**

Students in this seminar will acquire an understanding of the legal issues currently at the forefront of the law surrounding Aboriginal title, rights and treaty rights. Topics will include, inter alia: private lands and Aboriginal title, treaty interpretation and infringement, infringement of Aboriginal rights, cross-border Aboriginal rights, proper-rights holders, proper Indigenous representatives, Métis rights versus other Indigenous rights, the duty to consult and administrative tribunals, UNDRIP and Canadian law, the modern treaty process, and the relationship between Indigenous legal orders and Canadian law.

An important additional objective is that of critically reflecting on the law as it has developed in this area. You are encouraged to enter fully into this process of critical reflection, with the aim of generating a (respectful) conversation about what might be deeper underlying forces accounting for the law as it has developed in this area.

## **Teaching Method & Expectations:**

Students are expected to attend each and every class. Students are expected (1) to *have read the assigned readings before class*, and (2) to be prepared to answer questions about the material during class discussions.

## **Evaluation:**

Evaluation will consist of class participation (30%) and a final paper (70%).

Class participation is important. Our guest speakers are all busy practitioners or judges. They are generously making time in their schedules to travel to UBC and share their perspectives and experience. It is incumbent on the entire class to show respect for their contributions by attending all classes and actively participating in the discussion.

The final paper is due by 4pm on the last day of classes, November 29th. The final papers are to be submitted by email in PDF format. Maximum length is 6,250 words excluding supporting footnotes and bibliography. Students may write on one of topics covered during the semester or, with the agreement of the instructor, choose a different topic.

## **Course Materials:**

Readings will consist of: case law available through Quicklaw or [www.canlii.org](http://www.canlii.org) and occasional additional readings sent to the class either as links to online locations or as email attachments.

Suggested reading (available at the bookstore): Jim Reynolds, *Aboriginal Peoples and the Law: A Critical Introduction* (Vancouver: UBC Press, 2018).

## General Structure:

Note: Subject to change, depending guest speaker availability.

WEEK	TOPIC(S)	READING(S)	GUEST SPEAKER
Sept 9	Intro Class	N/A	N/A
Sept 16	Infringement of Aboriginal rights	<p><b>Required:</b>  <i>Ahousaht Indian Band and Nation v. Canada (Attorney General)</i>, 2018 BCSC 633</p> <p>Ryan Beaton, “Articles 27 and 46(2): UNDRIP Signposts Pointing beyond the Justifiable-infringement Morass of Section 35” in John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds, <i>Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples</i> (Waterloo: Centre for International Governance Innovation, 2019) 167-175</p> <p>Joshua Nichols, “The Limits of Meaningful Aboriginal and Treaty Rights” in <i>Environmental Challenges on Indigenous Lands</i> (2019), online: Centre for International Governance Innovation  <a href="http://cigionline.org/articles/limits-meaningful-aboriginal-and-treaty-rights">cigionline.org/articles/limits-meaningful-aboriginal-and-treaty-rights</a></p> <p><b>Suggested:</b></p>	Matt Kirchner

		<p><i>R. v. Sparrow</i>, [1990] 1 SCR 1075</p> <p><i>R. v. Badger</i>, [1996] 1 SCR 771</p> <p><i>R. v. Pierone</i>, 2018 SKCA 30</p>	
Sept 23	Cross-border Aboriginal rights	<p><b>Required:</b></p> <p><i>R. v. Desautel</i>, 2019 BCCA 151</p> <p><i>Mitchell v. M.N.R.</i>, 2001 SCC 33</p> <p><i>R. v. Green</i>, 2019 SKPC 44</p>	Mark Underhill
Sept 30  Kate Gunn will teach	Treaty interpretation and infringement	<p><b>Required:</b></p> <p><i>Restoule v. Canada (Attorney General)</i>, 2018 ONSC 7701</p> <p>Michael Asch, "Confederation Treaties and Reconciliation: Stepping Back into the Future" in Michael Asch, John Borrows and James Tully, eds, <i>Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings</i> (Toronto: University of Toronto Press, 2018) 29-48</p> <p><b>Suggested:</b></p> <p><i>R. v. Marshall</i>, [1999] 3 SCR 456</p> <p><i>R. v. Marshall; R. v. Bernard</i>, [2005] 2 SCR 220</p> <p><i>Grassy Narrows First Nation v. Ontario (Natural Resources)</i>, 2014 SCC 48</p> <p><i>First Nation of Nacho Nyak Dun v. Yukon</i>, 2017 SCC 58</p> <p><i>Beckman v. Little Salmon/Carmacks First Nation</i>, 2019 SCC 53</p>	Joe Arvay
Oct 7	Current issues in Aboriginal title	<p><b>Required:</b></p>	Greg McDade

		<p><i>Saik'uz First Nation and Stelat'en First Nation v. Rio Tinto Alcan Inc.</i>, 2015 BCCA 154</p> <p>John Borrows, "Aboriginal Title and Private Property" (2015) 68 SCLR 1-27</p> <p>Kent McNeil, "Indigenous Law and Aboriginal Title" (2017) Osgoode Legal Studies Research Paper Series 183</p> <p>Robert Hamilton, "Private Property and Aboriginal Title: What Is the Role of Equity in Mediating Conflicting Claims" (2018) 51(2) UBCLR 347-390</p> <p><b>Suggested:</b></p> <p><a href="#">Elsipogtog Statement of Claim (2016)</a></p> <p><a href="#">Kwikwetlem First Nation Notice of Civil Claim (2016)</a></p> <p><i>Giesbrecht v. British Columbia</i>, 2018 BCSC 822</p> <p><a href="#">Stk'emlupsemc te Secwépemc First Nation Notice of Civil Claim (2015)</a></p> <p><i>Cowichan Tribes v. Canada (Attorney General)</i>, 2017 BCSC 1575</p> <p><i>The Council of the Haida Nation v. British Columbia</i>, 2018 BCSC 277</p>	
Oct 21	Métis rights versus other Indigenous rights	<p><b>Required:</b></p> <p><i>Daniels v. Canada (Indian Affairs and Northern Development)</i>, [2016] 1 SCR 99</p> <p>Zoe Todd, "From a Fishy Place: Examining Canadian State Law</p>	Paul Seaman

		<p>Applied in the Daniels Decision from the Perspective of Métis Legal Orders”, Topia, 36, 2016, pp. 43-57</p> <p><b>Suggested:</b>  <i>R. v. Powley</i>, [2003] 2 SCR 207, 2003</p> <p><i>Manitoba Metis Federation Inc. v. Canada (Attorney General)</i>, [2013] 1 SCR 623</p>	
Oct 28	Duty to consult and administrative tribunals	<p><b>Required</b>  <i>Tsleil-Waututh Nation v. Canada (Attorney General)</i>, 2018 FCA 153</p> <p><i>Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council</i>, [2010] 2 SCR 650</p> <p>Angela D’Elia Decembrini and Shin Imai, “Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put Neskonalith to Rest” (2019) 56(3) ALR 935-950</p> <p><b>Suggested:</b>  <i>Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.</i>, [2017] 1 SCR 1099</p> <p><i>Clyde River (Hamlet) v. Petroleum Geo-Services Inc.</i>, [2017] 1 SCR 1069</p>	Maxime Faille
Nov 4	Duty to consult and legislation	<p><b>Required:</b>  <i>Mikisew Cree First Nation v. Canada (Governor General in Council)</i>, 2018 SCC 40</p> <p>Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in</p>	Robert Janes

		<p>John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds, <i>Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples</i> (Waterloo: Centre for International Governance Innovation, 2019) 65-81</p> <p><b>Suggested:</b>  <i>Haida Nation v. British Columbia (Minister of Forests)</i>, [2004] 3 SCR 511</p> <p>Julia Hughes et al, “Gendering the Duty to Consult: How Section 35 and the Duty to Consult are Failing Aboriginal Women” (2017), online (pdf): Urban Aboriginal Knowledge Network &lt;uakn.org&gt;</p> <p>Robert Hamilton and Joshua Nichols, “The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult” (2019) 56 ALR 729-760</p>	
Nov 18	The modern treaty process	<p><b>Required:</b>  <a href="#">Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia (2019)</a></p> <p><i>Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands &amp; Natural Resource Operations)</i>, 2018 BCSC 440</p>	Mark Stevenson
Nov 25	Indigenous legal orders and Canadian law	<p><b>Required:</b>  <i>Whalen v. Fort McMurray No. 468 First Nation</i>, 2019 FC 732</p> <p>John Borrows, “Revitalizing Canada’s Indigenous Constitution: Two Challenges” in John Borrows, Larry</p>	<p>Chief Leah George-Wilson</p> <p>Justice Favel</p>

		<p>Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds, <i>Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples</i> (Waterloo: Centre for International Governance Innovation, 2019) 29-37</p> <p><a href="#">Heiltsuk Adjudication Report (2018)</a></p> <p><a href="#">Nulh Ghah Dechen Ts'edilhtan (Tsilhqot'in Nation Wildlife Law, 2019)</a></p> <p><b>Suggested:</b></p> <p><a href="#">Heiltsuk Notice of Civil Claim (2018)</a></p> <p>Haida and Heiltsuk Submissions to BC Court of Appeal as Interested Parties in the Environmental Management Act Reference Case (BCCA File No. CA45253)</p> <p><a href="https://www1.webcastcanada.ca/bc/?file=march19-19-4">https://www1.webcastcanada.ca/bc/?file=march19-19-4</a></p> <p><a href="https://www.bccourts.ca/Court_of_Appeal/webcast/factums/intervenor/CA45253_factum%20-%20Heiltsuk.pdf">https://www.bccourts.ca/Court_of_Appeal/webcast/factums/intervenor/CA45253_factum%20-%20Heiltsuk.pdf</a></p> <p><a href="#">Secwepemc Lands and Resources Law Research Project (2016)</a></p>	
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