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*****REVISED EXAM*****

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**THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW**

FINAL EXAMINATION – APRIL 2019

LAW 201c.002 and 201b.002

**Canadian Constitutional Law:
Charter (Professor Parkes) and *Aboriginal & Treaty Rights* (Professor Mack)**

TOTAL MARKS: 100

THIS EXAMINATION CONSISTS OF TWO (2) PARTS:

**PART 1: CHARTER
(TWO HOURS PLUS 15 MINUTES READING TIME)**

**PART 2: ABORIGINAL & TREATY RIGHTS
(ONE HOUR PLUS 15 MINUTES READING TIME)**

TOTAL TIME ALLOWED: THREE (3) HOURS PLUS 30 MINUTES READING TIME

1. This is an open book examination. This means that you are entitled to have with you the course Casebook and Supplements, the *Constitution Act*, 1982, any materials posted on the course Connect page, and your notes. You may not bring in the Hogg textbook (or copies/excerpts from it).
2. **Read every question carefully.** Be sure you understand what you are being asked to do before you begin your answer.
3. **Be careful to budget your time.** A brilliant answer to one question cannot make up for the failure to answer another question.
4. You may use short forms of case names (e.g., *Oakes*).
5. This examination (Parts 1 and 2 combined) counts for 100% of your final grade in this course, unless it would improve your grade to count your December examination mark, in which case the latter mark will count for 25% of your final grade. Part 1 (*Charter*) will be marked by Professor Parkes and is worth 2/3 of this exam. Part 2 (*Aboriginal & Treaty Rights*) will be marked by Professor Mack and is worth 1/3 of this exam.

Part 1: Charter

You must answer BOTH questions in this section.

Charter Question A – worth 70% of your Charter Exam (allocated 84 minutes out of 120)

Measles is a highly contagious disease caused by the measles virus, typically passed through the air or direct physical contact. Initial symptoms usually include a high fever, followed by a rash on the neck and face that can spread to the hands and feet. Complications and death can result from a measles infection, most commonly in infants under one year old and in some adults. However, measles is preventable through vaccination. The vaccine helps the body make antibodies to fight off the measles virus.

Since the introduction of the measles vaccine in the 1960s, rates of measles infections have dropped dramatically. The overwhelming scientific evidence proves the safety and efficacy of vaccination to control, and even eradicate, certain diseases. High vaccination coverage is necessary to protect public health through what is known as herd immunity. Research has shown that a 90% vaccination rate is generally required for herd immunity (*i.e.*, at least 90% of children should be vaccinated to prevent outbreaks of infectious diseases). Vaccinations such as those for measles are provided free of charge and are widely available throughout the province. However, a 2018 study from the University of British Columbia examined the rate of vaccination among elementary school-aged children in BC and found that nearly half of all schools examined had vaccination rates below the recommended 90% threshold.

Europe and North America are currently seeing a rise in rates of measles infection. Whereas the disease was at an all-time low a few years ago, infection rates have been climbing and at least 37 people have died in Europe in 2019. The World Health Organization, a specialized agency of the United Nations concerned with international public health, has cited a rise in opposition to vaccines as a key factor in the recent outbreaks.

A very small number of Canadians object to vaccination on religious grounds. A splinter group of the Dutch Reformed Church believes that vaccinations interfere with a person's relationship with God and some faith healing groups reject all medical intervention including vaccines. A 2008 outbreak of mumps in the Fraser Valley of BC was linked to members of the Dutch Reformed sect who refuse all vaccinations. (Mumps is another infectious disease that had been largely eradicated due to widespread childhood vaccination.)

The vast majority of opposition to childhood vaccination in Canada is not linked to religion, but instead comes from parents who are skeptical of the benefits of vaccines and who believe that there is a link between vaccines, including the measles vaccine, and autism or other adverse health conditions. A 1998 study published in a leading medical journal had made such a claim about autism and vaccination. However, that research was later thoroughly discredited. The doctor who authored the study was stripped of his medical license and subjected to discipline for non-compliance with research protocols and ethics. Nevertheless, anti-vaccination groups such as Vaccine-No Canada, which (according to its website) "was formed in response to growing

parental concern regarding the safety of current vaccination programs in Canada,” claim a significant following and appeal to genuine, deeply-held, concerns that the mainstream medical system and big pharmaceutical companies have exaggerated the benefits of vaccines and suppressed evidence of adverse reactions. UBC researchers estimate that approximately 0.5% of British Columbians are strongly opposed to vaccinations on these grounds. However, a larger group (as much as 5-10% of the adult population in some parts of the country) have some level of skepticism about the safety and effectiveness of vaccinations.

Since the beginning of 2019, there have been 75 confirmed cases of measles among British Columbia residents. In March 2019 a 9-month-old baby who was undergoing cancer treatment died in BC Children’s Hospital after contracting measles. The source of the infection was a 10-year-old unvaccinated child who had been admitted to the Emergency Room earlier that week.

BC’s Minister of Health, Christina Yang, vowed that her government would take strong action to protect the health of British Columbians through vaccination. The recent provincial budget included new funding for a broad-based public education campaign about the benefits of vaccination. However, the centerpiece of the government’s response is a proposal for mandatory vaccination. To that end, lawyers in the Ministry of Health have drafted the *Immunization of Students Act (ISA)* which provides in relevant part:

- 1. The purpose of this Act is to protect the lives and health of children and other British Columbians against the diseases that are designated under this Act.**
- 2. The parent or guardian of a student shall complete the prescribed program of immunization in relation to each of the designated diseases and, upon request by a school official, provide proof of that prescribed program of immunization.**
- 3. Section 2 does not apply to the parent or guardian who submits to the Minister of Health a statement of medical exemption in respect of a student.**
- 4. Every person who contravenes section 2 is guilty of an offence and on conviction is liable to a fine of not more than \$1,000.**

“designated diseases” means diphtheria, measles, mumps, poliomyelitis, rubella, tetanus and any other disease prescribed by the Minister of Health

“school” means public or private schools for kindergarten to grade 12, located in the province of British Columbia

“statement of medical exemption” means a statement in the prescribed form signed by a physician stating that the prescribed program of immunization in relation to a designated disease or designated diseases,

- (a) may be detrimental to the health of the student named in the statement,**
- or**

(b) is unnecessary in respect of the student named in the statement by reason of past infection or laboratory evidence of immunity.

Similar laws exist in four other Canadian provinces but they contain an exemption for parents who object to vaccination for religious or conscientious (philosophical or strongly held personal) beliefs, in addition to the medical exemption. In announcing her intention to bring in a mandatory vaccination law, Minister Yang said in a press conference, “this government will not stand by and allow dangerous diseases to claim the lives or compromise the health of our children and other vulnerable members of society. Parental objections on behalf of children should never defeat a child’s right to receive necessary health interventions, nor should they be able to undermine the collective benefits of vaccination for all British Columbians. Objections to vaccination that we are seeing today are based on fear and misinformation.”

The Minister cited a report by a professor of health law from the University of Alberta which found that rates of immunization were consistently above “herd immunity” levels (well over 90%) in jurisdictions that had some form of mandatory vaccination law. The highest rates of immunization are found in jurisdictions, including a number in Europe and the United States, that mandated childhood vaccination and only provided exemptions for medical reasons. The same study also noted that some jurisdictions with very strong public health infrastructure achieved rates over 90% without making vaccination mandatory (although this latter evidence was somewhat dated, having been reported before the rise of the anti-vaccination movement in the last twenty years).

Vaccine-No Canada reacted quickly to Minister Yang’s announcement, posting the following statement on the organization’s website: “Canadian parents have the legal authority and constitutional right to make decisions about their children’s health. The idea that parents could be forced by the state to subject their children to unsafe and harmful vaccinations is deeply distressing to our membership and abhorrent in a free and democratic society. And we think the Canadian courts will agree with us.”

You are lawyer in the BC Ministry of the Attorney General. You have been asked to write a memo on the *Charter* issues raised by this proposed law. In particular, please answer the following questions:

- 1. Does the proposed law likely violate the s. 2(a) or s. 7 *Charter* rights of parents who refuse to have their children vaccinated? Explain your answer. Do not deal with any threshold issues such as *Charter* application or standing. (40 marks / 48 minutes)**
- 2. Assuming for purposes of this question that you have found a violation of s. 2(a) of the *Charter*, would that limit on rights likely be upheld under s. 1 of the *Charter*? Include a brief discussion of how the s. 1 analysis would be different, if at all, if a violation of s. 7 were found. Do not consider remedies. (30 marks / 36 minutes)**

Question B on next page →

Charter Question B – worth 30% of your Charter Exam (allocated 36 minutes out of 120)

You are an articling student working in a public interest legal office. You recently attended a family reunion where you had a long conversation with your 16-year-old cousin, Lisa Simpson, who has a keen interest in politics. Since she was 12 or 13 years-old she has closely followed municipal, provincial, and federal elections. She is deeply disappointed that she has to wait until she is 18 to vote. She pulls up section 29 of the BC *Elections Act* on her phone and shows it to you. That section provides as follows:

- 29. In order to vote in an election for an electoral district, an individual must**
- (a) be a Canadian citizen,**
 - (b) be 18 years of age or older on general voting day for the election,**
 - (c) be a resident of the electoral district,**
 - (d) have been a resident of British Columbia for at least 6 months immediately before general voting day for the election,**
 - (e) be registered as a voter for the electoral district or register as such in conjunction with voting, and**
 - (f) not be disqualified by this Act or any other enactment from voting in the election or be otherwise disqualified by law.**

Lisa asks you how s. 29(b) can still be on the books. She has read the *Canadian Charter of Rights and Freedoms* and she thinks that the voting age must violate her s. 15 equality rights. Lisa points to Swedish teenager Greta Thunberg, who has, since the age of 15, been attracting international media attention for her political activism around climate change. When she was 15-years-old she started the international school climate strike movement in which thousands of young people from around the world leave school on Fridays to march to their local legislature, calling on politicians to act on climate change. At the age of 16 Thunberg made speeches at the United Nations and other international political meetings. Lisa knows many other 16- and 17-year-olds who are engaged in politics and want to have their voices heard.

You go home and do a little research. You find out that a majority of countries around the world have voting ages of 18 or higher. However, jurisdictions such as Austria, Argentina, Brazil, Cuba, and Scotland have lowered their voting age to 16. In a number of other countries (including New Zealand and Luxembourg) initiatives to lower the voting age to 16 have been recently debated and rejected in national legislatures.

You note that the age of 16 has legal significance in a number of respects in BC. At 16, one can obtain a license to drive a motor vehicle, work without restrictions on hours, and pay taxes. However, the ages of 18 and 19 may be more significant in law as the “age of majority” (19 in BC but 18 in about half of the Canadian provinces). At the age of majority it is legal to purchase alcohol, cigarettes, or lottery tickets; change one’s name; get married without parental permission; join the armed forces; stand for political office; and more.

Voter turnout in Canadian provincial and federal elections is lowest among the 18-24 year-old cohort and highest among those 65 years or older. A study of voters' ages and habits in Denmark found that 18-year-olds were far more likely to cast their "first vote" than 19-year-olds, and that every month of extra age in those years resulted in a decline in "first vote" turnout.

You have found an opinion poll from 2015, reporting that 91% of Canadians surveyed agreed that the voting age should remain at 18. The most common justifications cited are the immaturity of youth and the need for more life experience to exercise an educated vote. Elections Canada, the independent federal elections body, has considered the issue and recommended keeping the voting age at 18, consistent with the age of majority in many provinces. To encourage youth engagement in the political process, Elections Canada has developed a "student vote" mock election curriculum that is available and recommended for implementation in high schools across the country. A similar educational curriculum has been created by Elections BC to encourage high school students in BC to become engaged in the electoral process. When you share this information with Lisa she remains firmly of the view that keeping the voting age at 18 discriminates against young people her age.

Over coffee in your office today, you raise this issue with a senior lawyer who is intrigued by the possibility of a legal challenge. She tells you to write a memo examining how a court would likely decide a s. 15 *Charter* challenge to s. 29(b). Do not consider threshold issues, s. 1, remedies, or any other *Charter* sections.

Part 2: Aboriginal & Treaty Rights

THIS PART OF THE EXAM CONSISTS OF 2 QUESTIONS

Please answer *both* questions below and divide your time appropriately:

Question 1 (65% of Aboriginal – 39 minutes)

Background

The Government's of Canada and British Columbia (BC) have announced their approval of ColCan's proposal to construct a \$500 million LNG processing plant at Bear Cove, on the West Coast of Vancouver Island. The project is expected to generate 800 jobs during peak construction and \$200 million in tax revenue. Perpetual Petro, ColCan's main stakeholder, has until August, 2018 to decide whether to move forward with the project, subject to the Canadian Environmental Assessment Agency's conditions (CEAA).

The announcement follows the release of the CEAA's Environmental Assessment Report (Report) on the ColCan LNG project. The Report concluded that, subject to the 51 conditions, ColCan's proposal represents little risk to the bear cove waterways and fishery. In announcing Federal approval of the ColCan project, the Minister of the Environment, Jim Venn stated,

"The ColCan LNG Project will deliver hundreds of good middle-class jobs on Vancouver Island. We are moving forward with natural resource development in a sustainable manner, because we have an obligation to leave the planet in better shape than we found it. This is an exciting day for British Columbia, for Canada and for the natural gas industry in this country."

Bear Cove is an important breeding ground for herring in the Pacific Northwest. Three First Nations claim title to Bear Cove. From north to south, these are the Matsqui (MFN), The Nuchalat (NFN) and the Opetsat First Nations (OFN). Both the MFN and OFN signed Impact Benefit Agreements with ColCan in January, 2018. Should the ColCan project move forward, both the MFN and OFN would receive \$5 Million. They are also promised an ongoing decision making role in the operations of the ColCan LNG facility. The NFN were offered the same on both fronts but have not responded.

In a joint statement both the MFN and OFN offered full support of the ColCan project and praised Canada and BC for their courage in developing BC resources for the benefit of all Canadians.

The NFN are forcefully opposed to LNG development. At a Recent NFN Council meeting their Chief promised that, "The Nuchalat will not sit idle while our neighbors are bought off by industry and government." The Chief asserted that the Nuchalat "have a legal obligation act as stewards of the lands that have provided for our people since time immemorial. To say yes to ColCan is to breach our sacred law". The Chief suggested that the Federal Environmental Assessment process was not transparent and "rigged the outset." The calculations and science supporting the Environmental Assessment plan have sparked wider controversy. The David Suzuki Foundation released a report criticizing the Federal Assessment Report's main findings as grounded in "flawed and outdated climate science that accounts for a less than half of the marine life potentially affected by the LNG processing plant." The Suzuki report, endorsed by 40 of the worlds leading environmental scientists, calls on the Canadian and British Columbia governments to reject the Federal Assessment and the ColCan proposal because of the high risk it poses to the sensitive marine ecosystem of Bear Cove.

The NFN believe that Bear Cove has been their home since "before the world had light". They also believe that the Bear Cove herring fishery is at the center of their traditional economy. Captain George Martinez, the first European to encounter the NFN's ancestors in 1780 wrote of the Nuchalat as a powerful nation that controlled all fisheries at Bear Cove and that the Nuchalat vigorously protected the areas lands and ocean, especially in the spring when the herring returned to the cove to spawn. The oral histories of the MFN, NFN and OFN all indicate that the NFN traded herring roe with their coastal neighbors and that the NFN developed trail routes to

trade roe with their Salish neighbors on the east side of the Vancouver Island. The oral histories all affirm that the Nuchalat were the dominant Indigenous group in the region in the early contact period.

The Nuchalat oral histories reference a devastating war with the MFN and OFN over Bear Cove. The war lasted one year and led to the death, enslavement and dispersal of the Nuchalat. The following year the herring did not return to Bear Cove. The MFN oral histories and the Bear Cove's archaeological record confirm that the war occurred in 1845.

The MNF and OFN believed that the herring refused to return because of the unprovoked attack on the NFN. The MFN and OFN proceeded to host a potlach (a central governing ceremonial institution) in the summer of 1863. The purpose of the potlach ceremony was to acknowledge that their earlier aggressions had broken the sacred and lawful bond between the herring and NFN and provide compensation as required by their laws. The Bear Cove lands and waterways were returned to the Nuchalat but with only 35 people (eight adults) in 1865, they did not permanently return to their Bear Cove village.

The NFN do return seasonally for herring fishery and other food and ceremony purposes. They continue to harvest medicinal plants, cedar bark, grass and berries seasonally through out the bear cove area. They have only one shed small house that the NFN use during the herring fishery. The NFN want to return permanently but developing the infrastructure to support a village in this remote location is expensive. With only 130 members, Department of Indian Affairs and Northern Development continues to deny the NFN's request for reserve development funds.

Directions:

Presume that you are an articling student for the law firm representing Perpetual Petro. Perpetual Petro is inclined to move forward with the ColCan project but they are concerned with the Aboriginal rights claims of the Nuchalat. **Specifically, your principal wants you to explore the following two questions:**

- a. How likely it is that the NFN prove Aboriginal title to Bear Cove?
- b. Presuming the NFN can prove Aboriginal Title, how likely is it that the ColCan project will be seen as a justifiable infringement on that title?

Note: In answering the above, be sure to identify your presumptions and explain why you are making them. Also be sure to identify where you believe more information is needed to resolve the question.

Question 2 (35% of Aboriginal—21 Minutes)

Discuss **ONE** of the following questions. Illustrate your answer with relevant examples from the course materials.

1. Professor Glen Coulthard stated the following about the SCC's treatment of s.35 rights:

“Even though the Court has secured an unprecedented degree of recognition for certain “cultural” practices within the state, it has nonetheless failed to challenge the racist origin of Canada’s assumed authority over indigenous peoples and their territories.”

Why might Prof. Coulthard frame constitutionalized Aboriginal Rights in this way? Do you agree or disagree with his statement? Explain and defend your answer with reference to materials covered in our class.

---Or---

2. In reference to the 1760-61 treaties signed with the Mi’kmaq, Lieutenant Governor Belcher proclaimed:

“The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.”

How much protection did this great headge afford Aboriginal treaty rights holders? Has the recognition and affirmation of Aboriginal Treaty rights under s.35.1 strengthened Aboriginal treaty rights?

END OF EXAMINATION

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