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**THIS EXAMINATION CONSISTS OF 4 PAGES (INLCUDING THIS PAGE)
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**THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW**

FINAL EXAMINATION – APRIL 11, 2019

UBC Law 353-001

Aboriginal & Treaty Rights: Aboriginal Title Litigation

Section 1

Professor: David M. Rosenberg, Q.C.

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

NOTE:

1. This is an open book examination.
2. ANSWER ALL 11 QUESTIONS.
3. There is a 300 word limit for each question.
4. Examinations are to be anonymous, submitted pursuant to the Exam Code.

THIS EXAMINATION CONSISTS OF 11 QUESTIONS.

The Province of British Columbia and the Federal Government decide that it would benefit the public at large if a multi-national company that is in the business of producing clean energy moves its operations from the United States to a remote location in British Columbia. The location in question is the site of an old abandoned rail yard. Half of the rail yard is on federal land and the other half is on provincial land, except for a small portion which is on a private lot held in fee simple by Henry Ford. The company involved claims to be a green energy producer. It is named the Clean Green Machine (hereinafter referred to “CGM”).

In its proposal, CGM says it would employ thousands of people and increase tax revenue for both Canada and British Columbia. CGM also says it would help reduce green house gas emissions which would be a benefit to British Columbians, Canadians and the international community. However, the CGM operation would involve flooding the lands.

As a condition of the deal, CGM insists on receiving clear title to all the land from the Crown and Henry Ford. CGM also demands as a condition of the deal, indemnification for any Aboriginal title claims with respect to the lands.

A First Nation (hereinafter referred to as “FN”) claims that the land is within their traditional territory. Their main reserve is adjacent to the land in question. The Crown purports to consult with FN and in the course of the consultations request that FN provide evidence of traditional use on the lands in question. FN responds by saying that it has no evidence at present concerning the actual specific site in question, but it provides oral history evidence, and historical and anthropological evidence, that its main reserve is at the location of a historical settlement which was exclusively occupied by the FN from time immemorial. It claims that the area adjacent to this historic settlement, which includes the land in question, was used for hunting, trapping, fishing, and providing subsistence for the ancestors of the FN.

The evidence that the Crown has in its possession indicates that the land in question is right next to the main historic village of the FN and that the custom of the FN was to use that territory for hunting, fishing, trapping, and access.

The FN asserts that it will prove Aboriginal title to the land in question and wants the Crown to not transfer title in the interim until title can be established in court. The FN says it needs that land for housing because there is a shortfall of available land on the reserve, and provides evidence of a waiting list for housing on the reserve and a lack of available land.

The Crown refuses to refrain from transferring title and proceeds to agree to the deal which has a closing date in 3 months time and includes the transfer of the property from the Crown, provincial and federal, to CGM.

The Crown, provincial and federal, pass companion statutes. Both the provincial statute and the federal statute are named the Clean Green Machine Act (hereinafter referred to as “CGMA”), which states in part that the transfer of the Crown lands is for the benefit of all Canadians and the said transfer cannot be challenged in court.

Question 1 (10 marks)

Prior to the actual transfer to the property, what options would you advise the FN were available if it wanted to prevent the transfer?

Question 2 (10 marks)

Following the completion of the deal, what options would you advise FN that it could take to protect the land?

Question 3 (5 marks for each sub-question for a total of 15 marks)

If you were counsel for the Crown, what advice would you give to the Crown prior to the closing date in terms of

- a) entering into negotiations with CGM;
- b) consulting with FN; and,
- c) assuming FN does not consent, on whether or not to proceed with the deal.

Question 4 (10 marks)

If you were counsel to CGM, what advice would you provide concerning its obligations and its exposure if it proceeds and completes the deal.

Question 5 (15 marks)

If you were a judge hearing the case brought by the FN concerning the validity of the Clean Green Machine Acts, provincial and federal, how would you determine whether or not the statutes in question were valid. Include in your answer a discussion of interjurisdictional immunity.

Question 6 (5 marks)

How would your answer to question 5 above be the same, or different, if the land in question was subject to a numbered treaty like Treaty 8.

Question 7 (10 marks)

Henry Ford is in favour of the deal and wants to sell his land to CGM. Henry Ford argues that any Aboriginal title claim to his land was either extinguished by the colony, the federal crown, or the provincial crown and when he purchased the land in fee simple it was not encumbered by any Aboriginal title claim. If you are acting for FN, what is your response to Henry Ford's claim? Can Henry Ford argue, alternatively, that if Aboriginal title is not extinguished, his fee simple still takes priority?

Question 8 (5 marks)

If FN brings an Aboriginal title claim to the subject lands and, after a trial, proves Aboriginal title to all of the land in question, what will be the likely legal effect on Henry Ford's title?

Question 9 (5 marks)

If the trial concludes with a declaration that the FN has a right to hunt and fish on the land, but does not have aboriginal title, what will the effect be on the future use of the land.

Question 10 (5 marks)

At the trial, the Crown produces a letter signed by the Chief of the Band in which he agrees to the deal. It turns out that the Chief did not have the support of the Band or the Board Council. Do the provisions of the Indian Act or the Royal Proclamation of 1763 have any relevance to the validity of the deal? Explain your answer.

Question 11 (10 marks)

At a hearing before the administrative tribunal to determine if permits should be granted for the project including a permit to clear cut the lands in question, and a permit to flood the lands in question, the FN appears to oppose the approvals.

- a) Does the FN have standing?
- b) Can the administrative tribunal consider whether the FN has aboriginal title?
- c) If you were the chairman of the administrative tribunal hearing the matter, what issues would you consider in determining whether or not to issue the authorizations?

END OF EXAMINATION