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**THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW**

FINAL EXAMINATION – DECEMBER 2018

**LAW 352.001
Aboriginal Peoples and Canadian Law**

Professor Darlene Johnston

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

NOTES:

1. This is an open book examination. Written materials are permitted, but all electronic devices (other than those required for the use of Examsoft Exemplify) are forbidden.
2. This exam is divided into two parts, Part A and Part B. You are required to answer 3 questions in total. The questions are of equal value, that is 33.3 marks per question. You should allocate 60 minutes to each question.
3. Part A consists of Questions 1 and 2. Answer all Questions in Part A.
4. Part B consists of a CHOICE of essay questions. Choose to answer either Question 3 or Question 4.

PART A: Answer QUESTION 1 AND QUESTION 2**QUESTION 1 (60 minutes: 33.3 marks)**

Joe and Irene were both born and raised on the reserve of the Eagle First Nation in British Columbia. They were high school sweethearts and married shortly after graduation. Joe worked in the logging industry and Irene was a cook in the daycare on the reserve.

Due to the housing crisis on the reserve, Joe and Irene were unable to find a house to rent and they spent the first few years of their marriage living with Joe's mother. Once they had their second child, Joe and Irene moved to the top of the list for a band housing loan. However, in order to get the loan for building a house, they needed to own a parcel of land. Joe's older brother Howard, who owned several lots of land on the reserve, decided to transfer his certificate of possession for 10-acre parcel to Joe. At the time, the land was vacant except for an old garage.

About three years after building their home, Joe was seriously injured in a logging accident and was no longer able to work. Irene continued her job at the daycare but was having trouble making their monthly housing loan payments. She decided to convert one of the bedrooms in their house into a sewing room and spent her evenings and weekends making traditional powwow dance clothing for sale. Her home business was so successful that soon Irene was able to pay off the housing loan. When her business began to outgrow the available space in the house, Irene applied to the band for an economic development loan to pay for the renovation of the garage into a sewing workshop and retail outlet. She received a \$20,000 loan and still owes \$5,000 to the band.

Irene's workload and Joe's disability has taken a toll on their marriage. Joe spends most of his time alone in the house. He resents the time that Irene spends in the sewing shop. He has become emotionally abusive to Irene and the children. Recently, Joe threatened to burn down the shop if Irene continued to spend so much time there. The tension in the home is now unbearable and Irene has asked Joe to move out and to go live with his mother. Joe told Irene that she should be the one to move out because the certificate of possession is in his name.

Irene has come to you seeking advice on her legal rights. Joe is unable to care for the children on his own. As a result, Irene assumes that she will end up with custody of the children. Due to the ongoing housing crisis, there are virtually no houses for rent on the reserve. If Irene cannot stay in the home with the children, then they will have to move away from the reserve. This will mean changing schools for the children and will make it difficult for them to maintain relationships with their friends and family. Irene wants to know whether you think that she will be able to stay in the family home. She also wants to know whether she has an interest in the house, the sewing shop, and the land. Advise Irene.

QUESTION 2 (60 minutes: 33.3 marks)

The Copper First Nation is located in the interior of British Columbia. They have never signed a land surrender treaty with the Crown. In spite of this, a small reserve, purportedly vested in Her Majesty, has been set aside for their use and benefit. Their traditional territory beyond the reserve encompasses more than 10,000 hectares, which continues to support the hunting, fishing and trapping activities of its members.

The social organization of the First Nation is based on three patrilineal clans: the Salmon, the Grizzly Bear and the Badger clans. Each clan is governed by a male chief who has inherited the office from his father. When matters arise of mutual concern, the three hereditary chiefs form a council and, with advice from their elders, operate by consensus decision-making.

For generations, the First Nation has steadfastly resisted the imposition of the *Indian Act* majoritarian system of band governance whereby chiefs and councillors are elected by majority votes and make their decisions by majority votes. They have also resisted the *Indian Act* system of landholding. By custom, lands are divided into three exclusive areas, one for each clan. Within each clan area, the hereditary chiefs make allotments to clan members for housing, hunting, fishing, trapping and cultural pursuits. Members of one clan are not allowed to live or harvest within another clan's area. This customary system applies both to their reserve lands and to the larger traditional territory. The authority of the hereditary chiefs is widely accepted and there are few disputes concerning governance or landholding.

When the British Columbia Treaty Commission (BCTC) first began operating, the Copper First Nation refused to participate because the process was based on a "rights-neutral" approach, that is, Canada and British Columbia refuse to recognize the existence of Aboriginal rights and title at the outset of negotiations. The Copper First Nation did not want to start from a position of non-recognition. They were also opposed to a process that would result in the extinguishment of any of their Aboriginal rights and title.

Over the last few years, however, the Copper First Nation has watched with growing concern as neighbouring First Nations have concluded Agreements in Principle which overlap with parts of their traditional territory. They are wondering whether they should now enter the treaty process in order to have their territory delineated as distinct from that of their neighbours.

The hereditary chiefs have heard that Tsawwassen Final Agreement is being used by Canada and British Columbia as a template for all future treaties. They are not familiar with the terms of the Tsawwassen Final Agreement and are seeking your advice about how it deals with overlapping claims and whether it involves an extinguishment of rights and title. They also want to know whether, based on the Tsawwassen model, they will have to compromise their customary systems of governance and landholding. To assist the Copper First Nation, draft a memo which identifies and explains the sections of chapters 2, 4, and 16 of the Tsawwassen Final Agreement that are relevant to their

objectives and concerns. Conclude your memo with a recommendation as to whether or not the Copper First Nation should file a Statement of Intent to negotiate a treaty with British Columbia and Canada under the auspices of the British Columbia Treaty Commission.

PART B: Answer only ONE of the following questions.

EITHER

QUESTION 3 (60 minutes: 33.3 marks)

The Royal Proclamation, 1763, articulates the inalienability of Indian lands in the following terms:

We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie;

Discuss how and to what extent these features of inalienability are reflected in the following instruments:

- *Indian Act*;
- *First Nations Land Management Act*;
- *Tsawwassen Final Agreement, Chapter 2*;
- *Tsawwassen First Nation Land Act*.

OR

QUESTION 4 (60 minutes: 33.3 marks)

In their article, “Land Management on First Nations Reserves: Lawful Possession and its Determinants”, Brinkhurst and Kessler conclude that “there are far fewer lawful possessions currently used than would be expected if most Bands and individuals actually perceived them as a beneficial tool.” [p.22]

Discuss the advantages and disadvantages associated with both lawful possessions under the *Indian Act* and customary allotments. Identify which values and characteristics are in play when First Nations choose to adopt one or the other system of landholding.

END OF EXAMINATION