

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

FINAL EXAMINATION – APRIL 2020

LAW 201.001

Canadian Constitutional Law: Charter, Aboriginal and Treaty Rights

Professors Joel Bakan and Johnny Mack

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

TOTAL MARKS: 100

WRITING TIME ALLOWED: 3 HOURS

PREPARATION + READING TIME ALLOWED: 10 + 10 = 20 MINUTES

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LAW 201.001: INFORMATION AND INSTRUCTIONS

1. 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 Bakan and is worth 50% of this exam. Part 2 (Aboriginal & Treaty Rights) will be marked by Professor Mack and is worth 50% of this exam.
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*, *Sparrow*).

PART 1: CHARTER

QUESTION 1

Total Marks: 27

The *Cannabis Act* is designed to strike a balance between liberalizing cannabis use and protecting people from adverse health effects resulting from such use. To achieve the latter, the *Act* includes restrictions on promoting cannabis. They are found in section 17:

17 (1) Unless authorized under this Act, it is prohibited to promote cannabis or a cannabis accessory or any service related to cannabis, including

(a) by advertising in a manner that there are reasonable grounds to believe could be appealing to young persons, as determined by the Expert Working Group;

(b) by presenting it or any of its brand elements in a manner that associates it or the brand element with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

(2) A person that is authorized to produce, sell or distribute cannabis may promote cannabis by means of informational promotion or brand-preference promotion if the promotion is

(a) in a communication that is addressed and sent to an individual who is 18 years of age or older and is identified by name;

(b) in a place where young persons are not permitted by law.

The purpose of the *Cannabis Act* is stated in section 7:

7 The purpose of this Act is to protect public health and public safety and, in particular, to protect the health of young persons by restricting their access to cannabis, and by limiting inducements for them to use cannabis.

When introducing the *Cannabis Act* in Parliament, the Minister of Health pointed to the importance of balancing the need to avoid over-criminalizing a morally neutral and otherwise lawful behavior and the need to protect youth and curtail negative health effects of cannabis use. The Minister said: “We don’t think it is right that people should go to prison for using cannabis. We don’t see anything wrong with consenting adults smoking marijuana, but let’s not pretend this stuff is harmless.” The Minister of Justice added: “Smoking pot *is* wrong. But our prisons are overcrowded. I can’t see why we should focus on this wrong. Let’s focus on the kids.”

Several publications suggest that cannabis can impact the development of children, particularly their cognitive skills. A Royal Commission of Canada report notes that negative health effects impact users aged 21 or younger, but the effects are most severe for users aged 14 or younger. The government points to these works and also some publications suggesting cannabis use by adults can inhibit their cognitive skills. In response, cannabis advocates note that a majority of published works on the topic find negative health effects for adults are minimal or non-existent. As well, the Liberty Institute recently released a report stating there is insufficient evidence in the published record to suggest adults are more likely to smoke marijuana if exposed to ‘lifestyle’ advertisements, such as those prohibited by s. 17(1)(b) of the *Act*.

Reefer Madness Inc. [RMI] manufactures cannabis products and distributes them to licensed retailers. The company’s advertising and packaging makes use of a cartoon character mascot: an anthropomorphic guitar-playing marijuana cigarette named ‘HiLife’. The company has now been charged under both sections 17(1)(a) and 17(1)(b) of the *Cannabis Act* for use of the HiLife image in its marketing. The Expert Working Group mentioned in s. 17(1)(a) found HiLife to be appealing to young people, and therefore within the terms of that section’s prohibition.

You are retained by RMI and asked for your opinion on the following questions:

- 1) Does section 17(1) of the *Cannabis Act* violate section 2(b) of the *Charter* (make sure to include section 1 arguments)? **(21 marks, 38 mins)**
- 2) Does the *Charter* apply to the Expert Working Group’s decision about HiLife? **(6 marks, 11 mins)**

NOTE: The Expert Working Group is composed of physicians, psychologists, and social scientists. The Group’s members are appointed by the Minister of Health, and its mandate is to provide “independent, arms-length, and expert scientific opinion” on questions about whether particular advertisements, packaging, or campaigns fall within the terms of s. 17(1)(a).

QUESTION 2

Marks: 8 (14 mins)

Explain the significance of *Eldridge v. British Columbia (Attorney General)* in relation to section 15(1).

QUESTION 3

Marks: 15 (27 mins)

What are the competing understandings of the proper role of government in Canadian society in the Supreme Court of Canada's *Charter* jurisprudence? Which of them do you find more persuasive?

Discuss the question in relation to ONE of the following:

1. Section 2(b) (and section 1)

-OR-

2. Section 32

-OR-

3. Both section 2(b)/1 and section 32

**END OF PART 1
PART 2 BEGINS ON THE FOLLOWING PAGE**

Part 2: ABORIGINAL AND TREATY RIGHTS:
THIS PART OF THE EXAM CONSISTS OF 2 QUESTIONS

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

Question 1 (25 Marks – 45minutes)

Background:

The Boise First Nation (BFN) consider Teardrop Lake to be their Grandmother. The BFN do not claim proprietary rights to the lake and understand it to belong to Khanag Nation. According to Boise elder and renowned knowledge keeper Larry Alfred, the BFN had a sacred encounter with this ancestor at the lake in 1808, 6 years before they met Simon Fraser, the first to travel into their territory. Alfred states,

Up until the Teardrop Lake encounter, our relationship with horse was not strong. We didn't trust the horse and the horse didn't trust us. The first herd moved into our territory twenty years prior and stayed to feed in our grasslands. Only our Chief could get close enough to touch them. That year, there was not much rain and creek near our summer village went dry. We had nothing to drink, and the nearest water source was a lake in the Khanag Nation's territory. We were not in good relationship with the Khanag and did not believe they would let us drink from their lake.

But one night our chief's late grandmother visited him in his dream. He wept in his dream, telling his grandmother that he could not bring water to his people and they were suffering. His grandmother led him to the Khanag lake where his people and the horses were drinking water. The next day the Chief went to meet with the Khanag leaders to negotiate peaceful access to their lake.

The negotiations went poorly but just as the chief was leaving for home the horses came out of the trail. One of the horses approached our Chief. The Khanag had never seen a horse and were afraid and amazed at the bond between our chief and the horses. Relations with the Khanag turned peaceful. We, the Boise people taught them how to befriend the horse and they allowed us to drink from the lake. Never again would we shed tears in the dry days of summer. This is why the Boise people call it Teardrop Lake.

The Khanag no longer exist. They were violently pushed out of their territory by gold prospectors in the Cariboo Gold rush and then decimated by the 1862 smallpox epidemic. No one knows what happened to the Khanag. The BFN returned to Teardrop Lake in the dry months of summer to water their horses and honour their Grandmother. They believe she lives in the lake.

In 1930, the federal government moved the BFN out of the mountains and close to the town of Merit. From time to time, the BFN hunters would return to the Teardrop lake area for game and to gather berries and traditional medicines. When at the lake, the Boise people would honour their grandmother and the Khanag with copper and sage. In 1930, the Indian agent confiscated

the horses from the BFN, which made it impossible for them to return to Teardrop lake and their traditional village sites.

The current BFN chief, Joseph Russ, returned to the community in 2002, after completing a degree in Indigenous Governance. Since his return, the community has undergone a cultural revival. They have rehabilitated their traditional trails and have re-established a summer camp at Teardrop lake, where they engage in ceremony to honour their Grandmother and the Khanag Nation's hospitality.

In January 2014 Snowcan applied for and received a permit to engage in exploratory drilling in the Teardrop lake district. The permit allows Snowcan to proceed with an extensive drilling project that is authorized 90 kilometres of new roads as well as 130 drill holes and 400 excavated test pits. Snowcan's preliminary assessments suggest that there may be significant gold deposits underneath Teardrop Lake.

Snowcan hosted two community meetings with the BFN where they provided an overview of the project. Snowcan explained that this phase of the project was designed to gather geological and hydrological data to guide the develop of the proposal which would come later. The BFN regard the exploratory drilling as invasive and extensively disruptive. Chief Russ reported to the local newspaper that "industry cannot be allowed to desecrate our sacred grounds for the pursuit of gold". The BFN understand that everything in the ground is interconnected, and this includes the minerals. Chief Russ claims that "Gold cannot be extracted without disrupting the balance of life that makes Teardrop Lake sacred. We cannot allow this project to go forward and our position will not change."

The BFN sought an injunction to halt any drilling that could potentially contaminate Teardrop lake. The BFN argued that Snowcan did not discharge their constitutional duty to consult with regard to their Aboriginal Rights to Teardrop lake. The BFN lost this argument at trial and also at the BC Court of Appeal. Snowcan intends to begin drilling in September, 2020.

Directions:

You are an articulated student at an Aboriginal Rights law firm that is representing the Boise First Nation. Your principle has asked you to provide her with a memo discussing the following:

- a. Can the BFN can establish constitutionally protected Aboriginal Rights to Teardrop Lake? (25 mins)
- b. Assuming the BFN can establish existing Aboriginal rights to Teardrop Lake, are those rights in any way infringed? (5 mins)
- c. Assuming that the BFN's Aboriginal rights are infringed, can those infringements be justified?

Question 2 (25 Marks – 45minutes)

Answer one of the following two questions. Explain and defend your answer with reference to materials covered in our class.

1. In reference to jurisprudence on constitutionally protected Aboriginal Rights, Glen Coulthard states,

Indeed, over the last 30 years the Supreme Court of Canada has consistently refused to recognize indigenous peoples' equal and self-determining status. This is based on the court's adherence to legal precedent founded on the white supremacist myth that indigenous societies were too primitive to bear fundamental political rights when they first encountered European powers."
[p. 12, *New Socialist*]

Yet Jeremy Webber sees the development of Aboriginal rights differently and claims that,

Constitutional actors generally, including the courts, grope for concepts and attempt to fashion institutions that can do justice to the encounter [between Indigenous peoples and the Crown], incorporate the principal aspirations of the contending parties, and order the relationship in constructive rather than destructive ways.
[p. 255, *The Constitution of Canada*]

What might account for these very different perspectives on s.35 Aboriginal rights? Do you agree more with Coulthard or Webber, or adopt a position between or outside of either position?

-OR-

2. In *Haida Nation*, para 27, the SCC states

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.

How does the framework of Constitutional obligations developed in *Haida Nation* function to ensure that the Crown does not “run roughshod” over asserted but unproven and undefined Aboriginal rights? Does this approach help to achieve the underlying purposes of s.35 Aboriginal rights?

END OF EXAMINATION