

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

FINAL EXAMINATION – APRIL 2020

LAW 201.002

Canadian Constitutional Law: Charter and Aboriginal & Treaty Rights

Professor Debra Parkes & Professor Johnny Mack

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

TOTAL MARKS: 100

WRITING TIME ALLOWED: 3 HOURS

PREPARATION + READING TIME ALLOWED: 10 + 20 = 30 MINUTES

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LAW 201.002: 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 Parkes 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

This Part consists of TWO questions. You must answer both questions.

Question 1 (22 marks out of 50; 40 minutes out of 90)

Fiona Gallagher recently lost her job as a telephone marketer when a Burnaby call centre closed down. Fiona's common law partner, Steve McBride, works full-time at a grocery store. Over the past three years, Fiona had been working part-time due to the fact that she is the primary caregiver to the couple's two children, aged 3 and 5. Her work at the call centre was also "on-call." Her child care responsibilities at home meant that she occasionally had to turn down work when she was unable to arrange child care.

Fiona, who had amassed 655 hours of employed work over the past year, applied for EI benefits, but was turned down on the basis of section 5 of the *Employment Insurance Act* which provides:

5. **An insured person qualifies for unemployment benefits under this Act if the person has worked a minimum of 700 hours in the year preceding the cessation of his or her employment.**

There is Canadian statistical evidence to show that:

- Under the 700 hour formula, approximately 52% of part-time workers are eligible for EI benefits, whereas 88% of full-time workers are eligible for EI benefits.
- 95% of mothers have primary child care responsibilities for their children;

- Women constitute approximately 75% of the part-time labour force;
- Women spend an average of 2.8 hours per day on paid work and 4.4 hours per day on unpaid work; men spend an average of 4.5 hours per day on paid work and 2.7 hours per day on unpaid work; and

The Employment Insurance regime has not always used the **hourly** formula currently found in section 5 of the *Act*. Before 2016, the Act employed a **weekly** formula. A claimant needed to work at least 20 weeks with a minimum of 15 hours per week in order to qualify for EI benefits.

The 2016 changes to the *Employment Insurance Act* were prompted by years of budget deficits at the federal level, combined with a growing concern among some Canadians that unemployment insurance was undermining the incentive to work. A 2015 government report noted:

Between 2000 and 2015, costs [of EI] doubled from \$10 billion to \$20 billion. There was evidence of growing long-term dependence as the number of people who collect benefits repeatedly year after year increased from 15% in 1995 to 40% of EI clients in 2015. There was also a recognition that long term unemployment was becoming more prevalent. Structural changes to the labour market had permanently changed the skills and abilities needed to find and keep a job in the 21st century. Finally, research suggested that the program was helping to create a cycle of dependency which was not only economically disadvantageous to individuals but also damaging to Canadian society.

Fiona has read the statistics set out above, and has realized that the hours-based system tends to exclude more women than men. Since the average man spends almost a third more hours each year in paid employment than the average woman, an eligibility requirement based solely on total hours of paid employment in a year is more easily met by workers who are men because they tend to have more hours available for paid employment.

Fiona is dismayed when she realizes that she would have qualified under the pre-2016 *Act*. She is frustrated that the new law disadvantages part-time workers and she thinks it sends a message that women's unpaid work in the home is not valuable.

Fiona has come to you, an expert in constitutional law, to find out whether she has a valid claim that s. 5 of the *Employment Insurance Act* violates her right to equality guaranteed by s. 15 of the *Canadian Charter of Rights and Freedoms*.

1. **Please provide Fiona with your opinion as to how she should present her s. 15 claim, what arguments she is likely to face, and how a court is likely to decide the s. 15 claim. Do not discuss s. 1 or remedy.** (22 marks out of 50; 40 minutes out of 90).

Question 2 (28 marks out of 50; 50 minutes out of 90)

On March 1, 2020, the *Farm Safety Act (FSA)* came into force in Ontario. Key sections of the FSA are outlined below but it is loosely modeled on the many “agricultural gag (ag gag) laws” that have been passed in US states. The FSA comes at a time when the animal agriculture industry across North America is increasingly under scrutiny for its treatment of animals. The advent of the smart phone has allowed journalists and activists to record in graphic detail conditions under which some farm animals, such as pigs and chickens, are kept. Undercover exposés in Ontario have revealed shocking images and video footage depicting suffering and abuse of farm animals. One recent video of the violent treatment of turkeys at a large-scale agricultural operation spurred an investigation leading to a conviction for animal cruelty against the company. A mink fur farm faces charges after whistleblower footage revealed suffering minks in 2019.

You are a staff lawyer with the animal rights group, Animal Justice. You read with concern the following sections of the FSA:

**2. In this Act,
“animal protection zone” means an area on a farm, facility or premises
on which farm animals may be kept or located.**

...

**4. (1) No person shall enter in or on an animal protection zone without the prior consent of the owner or occupier of the farm or facility.
(2) For the purposes of subsections (1), consent to entering in or on an animal protection zone is invalid if it is obtained from the owner or occupier of the relevant farm, animal processing facility or prescribed premises under false pretences and a consent so obtained shall be deemed not to have been given.**

Section 10 of the Act provides for escalating fines of up to \$15,000 for a first offence under s. 4 and up to \$30,000 for subsequent offences (compared to a \$10,000 maximum fine under the *Trespass to Property Act*, which applies generally to trespass in the province). Other sections of the Act create an offence of obstructing or hindering the transport of animals, expand powers of arrest by farm owners on their property, and create a civil cause of action for damages against persons convicted under the Act.

In introducing the FSA, the Minister of Agriculture, Arthur Weasley, said:

It is my pleasure and honour today to introduce the *Food Security Act*. Ontario’s agriculture sector contributes more than \$47 billion to our gross domestic product and employs over 800,000 people. Farm families care deeply about the welfare of animals and the safety of our food system. This bill is intended to protect farm animals, the food supply, farmers and others from risks that are created when trespassers enter places where farm animals are kept or when persons engage in

unauthorized interactions with farm animals. The risks include the risk of exposing farm animals to disease and stress, as well as the risk of introducing contaminants into the food supply. Mr. Speaker, we feel that this proposed bill is fair. It balances the safety and security of farmers and their families and our food supply, while protecting rights to legitimate debate and protest.

Minister Weasley further stated that the government had received more than 900 stakeholder letters calling for increased protections for farmers. He went on, "All our consultation meetings and round tables pointed to the fact that Ontario farmers have been facing increasing incidents of trespass on farms, including those that have resulted in theft and the release of livestock. Farmers told us that people entering their farms under false pretences was becoming increasingly problematic."

Animal Justice was not invited to any of these consultation meetings, nor to your knowledge, were any other animal welfare organizations. Animal Justice believes that s. 4 of the *FSA* was enacted to protect the animal agriculture industry from public scrutiny and criticism and not to protect animals from disease and stress or to safeguard the food supply.

Minerva McGonagall, a professor of journalism at the University of Central Canada, has studied the growth of undercover investigations in the agricultural sector in North America. In virtually all of these cases the whistleblowers obtained employment at a farm or processing plant. They did not reveal that their intent was to investigate and record the living conditions of animals. In this sense, they obtained access under false pretences — a common practice among investigative journalists trying to expose wrongdoing. Professor McGonagall's research concludes that investigative reporting in this sector promotes open dialogue about animal use practices and food safety.

You have been contacted by Luna Lovegood, an animal rights activist who recently worked at Happy Acres, a large hog farm operation in Southern Ontario, in an attempt to document the treatment of animals there. While at work, she surreptitiously took graphic photos showing pigs crammed into pens, unable to move, and posted them to the internet. In addition to being fired from her job, Luna became the first person to be charged under s. 4(1) of the *FSA* for entering an animal protection zone under false pretences. She thinks the law is unconstitutional and she wants Animal Justice to represent her. Assume for purposes of this question that Luna's conduct meets the elements of the offence.

- 2. Is Luna likely to be able to convince a court that s. 4 of the *FSA* violates s. 2(b) of the *Charter* and is not a reasonable limit pursuant to s. 1? Be sure to discuss the arguments you will make on Luna's behalf, the arguments you will face from the government, and the likely result. Do not discuss remedies or any other *Charter* provisions. (28 marks out of 50; 50 minutes out of 90)**

End of Part 1. **Part 2 (Aboriginal & Treaty Rights) starts on the next 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 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