

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

FINAL EXAMINATION – APRIL 2020

LAW 201.003  
Canadian Constitutional Law: Charter, Aboriginal & Treaty Rights

Professor Kong & Professor Johnston

**EXAMSOFT PASSWORD:**  
**EXAMSOFT RESUME CODE:**

**TOTAL MARKS: 100**

**WRITING TIME ALLOWED: 3 HOURS**  
**PREPARATION TIME ALLOWED: 10 MINUTES**

Preparation Time has been given to download/print/set up for your exam once the exam has been made available online through Canvas. This time cannot be used for writing exam answers. All exam answer uploads will be monitored to ensure that typing of answers only occurred for the allotted Writing Time.

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This is an open book examination, meaning that you can refer to class notes, casebook/course materials, a copy of the Constitution Acts, 1867 to 1982 and the CanLII links provided for in Professor Johnston's course syllabus. The use of any other materials, including online materials not found in those CanLII links, as well as library books, is not permitted.

Any exam answers that raise suspicion of breaking any restrictions outlined on this cover page may be subject to being processed through academic integrity software.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question.

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As this exam is being written off-campus and is unsupervised, any communication whatsoever (including but not limited to in person, telephone, e-mail, text, social media etc.) concerning the contents of this examination with anyone (other than your instructor or staff of the Allard School of Law) is strictly prohibited.

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You must also upload to Canvas any exam answers that you completed in a word processing software or via hand-writing. Please convert your word processing software file into PDF format, or take a picture or scan of your handwritten pages putting them into one folder. Upload the answer file/folder into the "Exam Answer File Submission (Word Processor or Hand-written ONLY)" link in the Law Exams – April 2020 course on Canvas. Your answer file/folder should be named, and the coversheet of your answers should be titled with:

Your Exam Code, Course Number, Name of Course, and Instructor Name  
i.e., **9999 LAW 100.001 Law of Exam Taking (Galileo)**

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If you had to type using word-processing software or hand-write some or all of your answers, and experience difficulties uploading your exam answer file/folder to Canvas, email your exam answer file/folder to [studentservices@ubc.ca](mailto:studentservices@ubc.ca).

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## LAW 201.003: 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.**
- 2) **Part 1 (Charter, Professor Kong) is worth 1/2 of this examination and is comprised of one (1) question on two (2) pages.**
- 3) **Part 2 (Aboriginal Law and Treaty Rights, Professor Johnston) is worth 1/2 of this examination and is comprised of two (2) questions on two (2) pages.**
- 4) **You are free to answer the parts of the exam in the order you prefer, but please be sure to indicate clearly at the beginning of each response which part and which question you are answering.**
- 5) **Please allocate your time to each part with care.**
- 6) **Professors Kong and Johnston will mark their respective parts of the exam independently.**
- 7) **You can refer to cases using short forms of the case names (e.g., *Oakes*).**

### PART I: CHARTER, PROFESSOR KONG

Nova Scotia's *Family Law Act* (hereinafter the Act) governs adoption procedures in the province.

Section 4 of the Act (hereinafter section 4) states: "Before receiving final approval to adopt a child, all individuals must complete a provincially approved program in parenting skills delivered by an accredited social worker."

Section 5 of the Act (hereinafter section 5) states: "No accredited social worker delivering a program referred to in section 4 may convey any religious idea or belief to any individual participating in the program."

Legislative debates reveal that the legislature's purpose in enacting section 4 was to ensure that "anyone seeking an adoption fully understand the responsibilities involved in parenting." Those debates further reveal that the purpose behind section 5 was to prevent social workers from (1) coercing individuals who seek to adopt a child into conforming with religious practices or beliefs, or (2) threatening them with negative consequences for failing to conform.

Social science evidence is mixed about whether government-mandated participation in parenting skills programs increases the understanding of individuals seeking to adopt. Some studies show that a majority of individuals who are required to participate in such programs will have already sought out the relevant information elsewhere. These individuals tend to resent the required programs and view them to be an unwarranted governmental constraint on their decision to become parents. Other studies show that younger and less educated individuals benefit from parenting skills programs and view them to be a valuable form of governmental assistance.

The government claims that it is entitled to draw a reasonable inference about the utility of section 4.

Daniel Hewlett is seeking to adopt a child in the province of Nova Scotia and claims that section 4 violates his Charter rights.

Wilfred Packard is a social worker who belongs to the Reformed branch of the Kongian faith. Kongians are a minority group in Canada who have suffered from long-standing discrimination. In 2000, the Supreme Leader of the Kongian faith stated that “social workers must tend to their clients’ spiritual and social needs. Therefore, in every interaction with a client a social worker must express the belief that that Lord Kong is supreme.” As a member of the Reformed branch, Wilfred Packard follows some but not all of the Supreme Leader’s commandments. He sincerely understands that his faith requires him to adhere to the commandments to the extent that it is professionally feasible. He claims that section 5 violates his Charter rights.

Question: You must analyze the section 2(b) OR section 2(a) Charter issues arising out of the above facts. You must ALSO analyze all issues arising from the above facts that are related to other Charter provisions covered in this course. You are to limit your analysis to materials covered in this course on the Charter.

You will be evaluated on the following dimensions:

**Accuracy:** In your answer, do you present the facts accurately? Do you refer to relevant legal materials accurately?

**Precision:** Do you address only those facts that are relevant to addressing the constitutional issues? Have you left out any significant facts in your analysis? Have you appealed to the legal authorities (and only those authorities) that are relevant to addressing the constitutional issues?

**Coherence:** If there is a relevant line of cases, have you presented it plausibly?

**Logic:** Do your conclusions follow from your premises? Have you avoided asserting conclusions that are unsupported by arguments?

**Organization and Clarity:** Have you made it easy for the reader to follow your arguments? Have you divided the question into manageable and logical parts? Do you express yourself in clear and precise prose?

**Part II on next page**

**PART II: ABORIGINAL AND TREATY RIGHTS, PROFESSOR JOHNSTON****QUESTION 1 Marks: 25****Recommended Time: 45 minutes**

The Trout Lake First Nation (TLFN) is located in the interior of British Columbia. They take their name from the spiritual connection that they have to Trout Lake which lies at the heart of their traditional territory. The lake figures prominently in their origin story, as being the place where their ancestors first emerged from its depths. It has been the site of ceremonies for thousands of years. In addition to its cultural significance, the lake has been an important harvesting site for a plentiful trout fishery. The TLFN understand themselves to be the stewards of the lake, with a duty to protect it from misuse and degradation.

In 1793, Alexander Mackenzie encountered the TLFN on the shores of Trout Lake. In a journal entry, he noted that the trout fishery sustained the TLFN and that surpluses were traded with neighbouring peoples, including the Coyote First Nation (CFN). In 1820, the Hudson's Bay Company established a trading post in the vicinity of the lake and relied upon the TLFN to supply the dietary needs of its employees. The presence of the trading post created an incentive for the CFN to leave its traditional territory and encroach upon TLFN lands. This encroachment caused an outbreak of violence between the two First Nations. The conflict was resolved by the CFN agreeing that they would seek the permission of the TLFN for access to the trout fishery on an annual basis and provide symbolic gifts in return for that access. Eventually, through intermarriage and adoption, the CFN was absorbed into the TLFN. To this day, many members of the TLFN continue to depend on the trout fishery for their sustenance.

The TLFN has never surrendered its lands to the Crown. In spite of this, the province of British Columbia has recently issued a lease of the lakebed to a multinational mining company, ARG. The company intends to drain the lake in order to develop an open-pit copper mine. The government has granted ARG a permit for this development because the mine will bring much needed employment to the economically depressed region. The TLFN has expressed its opposition to the mining development because it will destroy both the cultural and economic value of Trout Lake. The government has failed to respond to their concerns.

Imagine that you are an articling student at a Vancouver law firm that represents the TLFN. They have indicated that it is their duty as the stewards of Trout Lake to defend it from this development. They are determined to stop the draining of the lake by any means at their disposal. Your principal has asked you to write a memorandum discussing the strengths and weaknesses of potential TLFN claims based on the assertion of Aboriginal rights and Aboriginal title. If you need more information to address a particular issue raised by the facts provided, indicate what type of information is required and why it matters to your analysis.

**QUESTION 2    Marks: 25****Recommended Time: 45 minutes**

In its decision in *R. v. Sparrow*, the Supreme Court of Canada interpreted the meaning of the expression "recognized and affirmed" as it appears in section 35(1) of the *Constitution Act, 1982*. In doing so, at page 1106, the Court cited the following excerpt from an article by Professor Lyon, "An Essay on Constitutional Interpretation":

Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

To what extent did the *Sparrow* decision lay the groundwork for Section 35(1) to achieve a just settlement? Discuss how this groundwork was impacted by the Supreme Court's subsequent decisions in *R. v. Van der Peet* and *R. v. Gladstone*.

**END OF EXAMINATION**