

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

FINAL EXAMINATION – APRIL 2020

LAW 201.004

Canadian Constitutional Law: Federalism, Charter and Aboriginal & Treaty Rights

Professor Elizabeth Edinger & Professor Gordon Christie

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

WRITING TIME ALLOWED: 3 HOURS + 10 MINUTES READING TIME
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.

This is an open book examination, meaning that you can refer to class notes, casebooks and other class readings. The use of 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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Your Exam Code, Course Number, Name of Course, and Instructor Name
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EXAM 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 (Federalism & Charter, Professor Edinger) is worth **2/3 of the total grade** for this examination and is comprised of three (3) questions. Part 1 is worth a total of 75 marks, each question is worth 25 marks. It is recommended that you spend 2 hours, plus 10 minutes reading time, on this section.
- 3) Part 2 (Aboriginal Law & Treaty Rights, Professor Christie) is worth **1/3 of the total grade** for this examination and is comprised of 1 (one) question. Part 2 is worth a total of 100 marks. It is recommended that you spend 1 hour on this section.
- 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 Edinger and Christie will mark their respective parts of the exam independently.

Part 1: Federalism & Charter (Professor Edinger) 75 Marks

(25 Marks)

1. David Evans (Evans), a Saskatchewan resident, was informed by his investing friends that Andrew Berger (Berger) is an investing genius. So he called Berger and talked to him. Berger lives in Costa Rica and has no connection with Saskatchewan except for a few clients like Evans and his friends.

Evans ultimately agreed to provide Berger with \$100,000 to invest. The investments that Berger made are doing well.

However, the relationship between Evans and Berger fell apart. Evans asked Berger to return his original investment. Nothing happened. So Evans complained about Berger to Financial and Consumer Affairs Authority (FCAA) which administers the *Securities Act 1988*, SS 1988-89 c.S-42.2 Berger was charged with breach of s.27(2) (a) of the *Securities Act* which provides:

(2) no person or company shall:

(a) act as a dealer or underwriter unless that person or company

(i) is registered as a dealer.....

It is common ground that Berger acted as a dealer and is not registered. The Securities Panel imposed a number of sanctions on Berger including a \$50,000 administrative penalty.

Berger appeals. His main argument is that he is not subject to the Saskatchewan *Act* because he lives in Costa Rica.

Draft the argument that the province should make.

(25 Marks)

2. TJ, a seventeen year old grade twelve student, was expelled from his Ontario high school on account of an essay he wrote as part of a final examination in a creative writing course. The essay, written in the first person, tells the story of a student who likes all his teachers but who is bullied by fellow students. The story ends with the narrator blowing up the school.

The decision to expel TJ was made by the school principal and upheld on appeal by the school board for the region. TJ was informed that he will be arrested if he is ever found on property of the high school.

Under the Ontario *Safe Schools Act*, the grounds for expulsion, set out in s.16, are drug dealing, carrying weapons and threatening other students. The school board found that TJ had ‘threatened other students’.

TJ has been given early acceptance at a prestigious university. Because he must complete the academic year in order to be eligible to attend, he wants desperately to return to school.

TJ and his parents consult you. They assert that TJ’s right to freedom of speech has been infringed. Draft a memorandum advising TJ:

1. whether his parents can bring a Charter action on his behalf against the high school which he used to attend;
2. whether the *Oakes* or the *Dore* approach should be used (explaining the difference between the two);

and

3. what remedy or remedies should be asked for.

(25 Marks)

3. The *Wildlife Act* RSBC 1996 c. 488 authorizes the Lieutenant Governor in Council to designate areas of the Province as wildlife areas. Pursuant to that *Act* an area of 26,000 hectares in the Kootenays was designated as the Columbia Wetlands Wildlife Area. The area was described in the press release as a “contiguous mosaic of diverse wetlands and riparian habitats of regional, provincial and international significance.” It included, inter alia, 200 km of a navigable river, the Columbia River.

The press release also referred to the numerous research projects documenting the negative impact on wetland habitats and on the native flora and fauna from jetskis, snowmobiles, motorcycles, speedboats, hovercraft and other motorized conveyances travelling at high speed or making loud noises.

The Lieutenant Governor in Council enacted a regulation providing that “...no person may enter the wildlife management area with a conveyance of any description which is powered by a motor which exceeds a rating of ten horsepower.”

In 2019, Jon Drake (Drake) was charged with having operated on the Columbia River a conveyance with a motor in excess of ten horsepower, namely a duck, in breach of the regulation. A duck is an amphibious vehicle and Drake had just embarked on the river when a Wildlife Manager spotted him.

Having attended law school for a year in the 1980s, Drake decided to represent himself. He admitted the facts and argued that the British Columbia regulation was invalid as legislation in relation to Navigation and Shipping, allocated to Parliament under s.91(10).

In the alternative, he argued that the regulation was inoperable because the *Canada Shipping Act* deals with the subject matter. The Governor in Council has enacted Boating Restriction Regulations limiting the operation of power driven vessels in listed waters. The Regulations authorize provinces to request that identified waters in the provinces be added to the list. British Columbia has not requested that the stretch of the Columbia River in the Columbia Wetlands Wildlife Area be added to the list. Therefore, Drake concluded, the Canada Shipping Act regulations permit the operation of any and all power driven vessels on that stretch of the Columbia River.

Drake was convicted and fined. He decided to appeal, and instead of representing himself, retains you. Draft a memorandum setting out the arguments that you will make when you appeal Drake’s conviction.

END OF PART I

PART II BEGINS ON NEXT PAGE

Part 2: Aboriginal and Treaty Rights (Professor Christie) 100 Marks

Please choose 1 (one) of the 3 (three) following questions to answer. Only answer the **one** question that you choose – answers to other questions will not be graded.

1. Fact-pattern question

Four decades ago, an open-pit gold mine was established on the traditional territory of Green Hill First Nation ('GHFN'), with Harrick Gold Company ('Harrick') owning and operating the facility. Over the years approximately \$2 billion worth of gold has been produced at the mine and its accompanying smelter. At the time that the mine was approved by the provincial government GHFN objected to the proposal, but in 1980 there were few legal avenues available for it to pursue and they lacked the resources to hire a law firm to explore what options might have been available. Five years ago, representatives from GHFN negotiated a 'tonnage-fee' with Harrick, whereby for each tonne of ore removed from the ground the company paid GHFN ten cents. It was understood that this agreement was in lieu of GHFN pursuing possible legal action against the mine and the province for such matters as environmental degradation caused by this open-pit mine and its accompanying toxic tailings-ponds. For each of the past five years this has meant that the company paid approximately \$1 million per year to GHFN.

Over the last year or so the quality of ore coming out of the mine has dropped, at the same time that the costs of production have gone up. A few months ago, Harrick sent a letter to GHFN notifying it that it was no longer going to abide by the fee arrangement, citing the economic struggles it was going through. Representatives of GHFN have come to your law firm to explore options they might be able to pursue under section 35, and in particular in relation to Aboriginal rights they might have in this situation. You have been tasked with writing a preliminary memo setting out how the law around section 35 might apply, given the facts as you have them. Indicate which other facts are necessary in order to flesh out this analysis as you progress through your answer.

2. Question based on Canadian jurisprudence on section 35

In *R v Sparrow* [(1990) 1 S.C.R. 1075] the Supreme Court of Canada, in discussing the fourth stage of analysis, wherein the Crown must show it can justify infringement of the right in question, held (at 1119) that:

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. ... [But] [t]he objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

In *R v Gladstone* [(1996) 2 S.C.R. 723] the Supreme Court of Canada, in discussing the justification of infringement stage of analysis, held (at 63) that:

[P]riority under *Sparrow's* justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights.

Do you think these two passages show a conflict or inconsistency within the jurisprudence on Aboriginal rights? If yes, what do you think should be done to rectify the situation? If you do not think there is an actual conflict or inconsistency, why do you think so? In either case, be sure to defend your response.

3. Argumentative question

In *Coastal Gaslink Pipeline Ltd. v Huson*, 2019 BCSC 2264, Madam Justice Church noted (at paragraph 127) that:

As a general rule, indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as aboriginal title or rights jurisprudence or statutory provisions ...

Do you think this is a justifiable position for a court in Canada to take? Why or why not? Be sure to defend your answer as fully as possible.

END OF EXAMINATION